No. 88-1698

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In The

Supreme Court of the United States

October Term, 1988

PHELPS DODGE CORPORATION,

Petitioner,

vs.

UNITED STEELWORKERS OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WAS IT A VIOLATION OF THE SUMMARY JUDGMENT STANDARDS ENUNCIATED BY THIS COURT FOR THE NINTH CIRCUIT TO MERELY ASSUME, WITHOUT REQUIRING ANY EVIDENCE, THAT THERE WAS A LAW ENFORCEMENT CONSPIRACY TO DERIVE PLAINTIFFS OF THEIR CIVIL RIGHTS?

2. MAY A CONSPIRACY TO VIOLATE CIVIL RIGHTS BE INFERRED FROM NOTHING MORE THAN CIRCUMSTANTIAL EVIDENCE WHICH IS EQUALLY OR MORE CONSISTENT WITH INNOCENT BEHAVIOR?

3. MAY A PRIVATE DEFENDANT BE HELD VICARIOUSLY LIABLE FOR CONSPIRACY WITH POLICE AND THE COURTS UNDER 42 U.S.C. § 1983 WITHOUT EVIDENCE THAT IT DIRECTED, CONTROLLED OR PARTICIPATED IN THE ALLEGED CIVIL RIGHTS VIOLATIONS?

4. DOES THE NINTH CIRCUIT'S OPINION ESTABLISH AN ERRONEOUS STANDARD WHICH THREATENS CITIZENS WITH LIABILITY FOR A "CONSPIRACY" WITH THE POLICE MERELY FOR DEMANDING ASSISTANCE AS VICTIMS OF CRIME?

FOOTNOTE IDENTIFYING PARTIES

The respondents to this petition for writ of certiorari are the plaintiffs/appellants below—namely, United Steelworkers of America; United Steelworkers of America, Local 4776; International Association of Machinists and Aerospace Workers, Lodge No. 1357; International Brotherhood of Electrical Workers, Local 523; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 741; International Union of Operating Engineers, Local 428; United Transportation Union, Local 807; Ronald Rhodes; William Hunter; William Puffer; Diana Pino Vega; Shea Burkhead; Amado Gonzalez; Art

(Continued on following page)

(Continued from previous page)

Galvez; Antonio Santiago; David Williams; Jose Ortiz; Richard Olea; Jerry Wolgamuth; Natalie Munoz; Soila Bon; and George Bustamante, individually and on behalf of others similarly situated.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, petitioner Phelps Dodge Corporation identifies the following as parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates: Alambres y Cables de Panama, S.A.; Alambres y Cables Venezolanos, C.A.; ALCAP Commercial, S.A.; Apache Powder Company; Asian Cables Limited; Bisbee Queen Mining Company; Black Mountain Mineral Development Company (Pty) Ltd.; Cables Electricos Ecuatorianos, C.A.; Cahosa, S.A.; Celbac, S.A.; Cobre Cerrillos, S.A.; Cobre Colada Continua, CCC, C.A.; Columbian Carbon Japan Ltd.; Columbian Carbon Philippines, Inc.; Comercial ECOHSA, S.A. de C.V.; Compania Minera Midas, S.A. de C.V.; CONDUCEN, S.A.; Conductores Electricos de Centro America, S.A.; CONELEC, S.A. de C.V.; Corporation Venezolana del Cobre, C.A.; Electroconductores de Honduras, S.A. de C.V.; Fabrica de Conductores Electricos, S.A.; Industria de Electrocoductores, S.A.; Kalayaan Realty Company, Inc.; Metal Fabricators of Zambia, Limited; Minera Pilares, S.A. de C.V.; PDTL Trading Company Limited; PD-Siam Rod Company Ltd.; Peru Mining Exploration & Development Company; Phelps Dodge Philippines; Phelps Dodge Svenska Metallverken International Corporation; Phelps Dodge Thailand Limited; Pietersburg Iron Company (Proprietary) Limited; Red Hill Mines Limited; Representaciones de Industrias Venezolanas, C.A.; Shashe Mines (Pty.) Ltd.; South Australian Uranium Corporation Pty. Limited; Southern Peru Copper Company; Sunnybrook Coal & Coke Company; Viem Metal Works, S.A.

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Petitioner Phelps Dodge Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on January 18, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc* in *United Steelworkers of America, et al. v. Phelps Dodge Corpora-*

tion, et al., is reported at 865 F.2d 1539 (App. A, *infra.*) The prior opinion (now withdrawn) of the three-judge panel of the Court of Appeals was reported at 833 F.2d 804 (App. B). The decision of the District Court was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1989, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 1983: Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Phelps Dodge Corporation petitions this Court to correct an opinion of the Ninth Circuit which holds in essence that Phelps Dodge may be liable for conspiracy to violate plaintiffs' civil rights as a result of its request that the police enforce the law in the face of a violent labor dispute. The case raises serious questions about the scope of a private citizen's liability under 42 U.S.C. § 1983 and the extent to which a plaintiff can meet his burden to prove conspiracy solely by speculative inferences.

Phelps Dodge operates a copper mine and mill in the small town of Ajo, Arizona, 130 miles from Tucson, the County seat. On July 1, 1983, the individual and union plaintiffs/respondents went on strike against Phelps Dodge. The strike was bitter and protracted. It divided the town and resulted in violence.

Phelps Dodge's efforts to remain in operation were met with violent demonstrations by the strikers and their unions. In what all parties agree was an explosive situation, the police met with representatives of both Phelps Dodge and the unions in efforts to keep the peace. Strikers and the unions requested law enforcement action against non-strikers who were alleged to have violated the law. Phelps Dodge requested action against the strikers for, *inter alia,* blocking the entrances to its facilities in efforts to interfere with its operations.

In response to harassment and obstruction by strikers of Phelps Dodge's non-striking workers, Phelps Dodge obtained a preliminary injunction from the Pima County Superior Court on July 14, 1983, enjoining strikers from obstructing the streets providing access to Phelps Dodge's

properties or otherwise interfering with its operations. The validity of that injunction is not challenged.

Despite the injunction, the strikers' actions in response to Phelps Dodge's attempts to maintain operations escalated. On August 8 and 9, 1983, up to 150 strikers and supporters armed with bats, clubs, chains and other weapons took to the streets, attacked a company car full of non-striking employees and otherwise prevented non-striking employees from entering or leaving the plant. Plaintiff Vega admitted the strikers' purpose in sealing off the streets leading to the plant entrances was to shut the company down.[1]

In response to these events, the Pima County Sheriff's Office and the Arizona Department of Public Safety sent reinforcements to attempt to restore order. In addition, the Sheriff and representatives of the County Attorney's Office initiated a meeting with representatives of Phelps Dodge. When asked what action the authorities intended to take against law-breaking strikers, the Sheriff indicated that he had a list of individuals for whom he intended to seek arrest warrants and recommend bail of $15,000.00. The Sheriff's and County Attorney's representatives subsequently went to defendant Justice of the Peace Helen Gilmartin to seek arrest warrants, which were prepared on August 11 but not issued by the Justice until August 25. Arrests were made pursuant to the warrants on August 25 and 26. The Justice set bail at $15,000.00 for each individual, and the arrestees were held for two days until their bail was posted.

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[1] The record before the courts below included a videotape which depicted, among other things, the rioting in the streets on August 8 and 9, 1983.

The unions and individual strikers and supporters sued Phelps Dodge, Pima County, County Sheriff Dupnik and individual deputies, the Arizona Department of Public Safety and individual officers, individual attorneys of the County Attorney's Office, and Justice of the Peace Gilmartin, alleging they had all participated in a conspiracy to deprive plaintiffs of their civil rights. Plaintiffs alleged the authorities had subjected them to discriminatory enforcement of the law, arrests without probable cause and excessive bail. The District Court's jurisdiction was invoked under 28 U.S.C. § 1343.

After the close of nearly two years of discovery, including over 90 depositions, Phelps Dodge moved for summary judgment. The motion was supported by affidavits from all of the key personnel alleged to have conspired with one another, each denying any improper concerted action or any efforts by Phelps Dodge to improperly influence law enforcement decisions. Phelps Dodge challenged plaintiffs to produce any evidence that the authorities acted other than independently or that there had been any conspiracy including Phelps Dodge or otherwise. Plaintiffs' response was in essence that while there was no direct evidence of conspiracy, a conspiracy could be "inferred" from evidence of Phelps Dodge's cooperation with law enforcement officials, Phelps Dodge's requests to the authorities to enforce the law, and the actions the authorities took.

After giving plaintiffs several opportunities to supplement their response, the District Court granted the motion and entered judgment for Phelps Dodge. The court also granted summary judgment for Justice of the Peace Gilmartin, the attorneys from the County Attorney's office, and the Department of Public Safety and its officers.

Plaintiffs appealed from only the judgment for Phelps Dodge.

The Ninth Circuit affirmed, stating that Phelps Dodge's "responses to the strike were those of an innocent, aggrieved party looking for justice and for protection by the police" and that "only speculation and conjecture could support a finding of a conspiracy." (App. B-8). Specifically addressing plaintiffs' attempt to infer a conspiracy from circumstantial evidence, the court held that "[a] jury could only speculate that the evidence of ties between the police and the company indicated improper leverage by the company over police, attorneys, and judicial officers." *Id.*

An *en banc* panel of the Ninth Circuit granted reconsideration and reversed, holding that while the evidence was consistent with an inference of Phelps Dodge's innocence, the plaintiffs should be permitted to attempt to persuade a jury to draw the opposite conclusion. Judge Trott's strong dissent, joined by Judge Beezer, characterized the conspiracy claim as "nothing more than a theory without proof" and expressed concern "that we improvidently create difficulties for people honestly attempting to work with public authorities to restore the rule of law during a public disorder." (App. A-31, 25).

Phelps Dodge petitions for a writ of certiorari to permit this Court to review several important precedents which may otherwise be established by the Ninth Circuit's published opinion on issues including the evidentiary standard on a motion for summary judgment, the standard of liability for a private party alleged to have conspired with the police, and the permissibility of inferences of conspiracy from no more than ambiguous circumstantial evidence.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT VIOLATED THIS COURT'S STANDARDS FOR SUMMARY JUDGMENT WHEN IT SIMPLY ASSUMED, WITHOUT REQUIRING EVIDENCE, THAT THERE WAS A LAW ENFORCEMENT CONSPIRACY TO DEPRIVE PLAINTIFFS OF THEIR CIVIL RIGHTS.

In *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), this Court confirmed that it is the plaintiff's burden in response to a properly stated motion for summary judgment to come forward with an affirmative showing of a material issue of fact requiring trial. Phelps Dodge's motion was supported by, *inter alia*, the affidavits of the various law enforcement and Phelps Dodge personnel alleged to have conspired, including the Sheriff, Justice of the Peace and Assistant County Attorneys. Those affidavits evidenced not only that Phelps Dodge did not participate in any conspiracy to deprive plaintiffs of their civil rights, but also that no such conspiracy existed involving *any* of the defendants.

According to *Celotex*, it was necessary only for Phelps Dodge to challenge the lack of evidence of either a conspiracy or Phelps Dodge's participation in it, since plaintiffs would bear the burden of proof on those issues at trial. *See e.g.*, 430 U.S. at 323: "we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim" (emphasis in original). Phelps Dodge not only made the necessary challenge, it also came forward with evidence of its own negating the conspiracy allegations. The burden therefore shifted to plaintiffs to come forward with "specific facts"

establishing the existence of a "genuine issue of material fact" as to both the existence of a law enforcement conspiracy and Phelps Dodge's participation in it.

It was not sufficient for plaintiffs to produce merely some evidence in support of their claims. Plaintiffs were required to produce evidence which could satisfy their evidentiary burden at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the evidence adduced by plaintiffs, despite being "colorable" or of some probative value, would not be sufficient to support a plaintiff's verdict under that standard, summary judgment was required. *Id.* at 249-250.

The Ninth Circuit's opinion contravened *Celotex* (and basic reason as well) when it began its analysis with the inexplicable "assumption" that a conspiracy existed and that the only issue was whether there was any evidence linking Phelps Dodge to it:

> Whether the Steelworkers have proven the existence of a conspiracy to deprive them of their civil rights is not before us. We assume for purposes of this appeal that such a conspiracy did exist and did violate their civil rights. We have before us only the narrow issue of whether the Steelworkers have alleged enough evidence that Phelps Dodge was in fact a participant in this conspiracy to defeat a motion for summary judgment.

(App. A-8). References to "the conspiracy" permeate the opinion, and it is apparent at every turn that the court based its analysis on a law enforcement conspiracy it simply "assumed."

The source of the court's assumption is a total mystery. The three-judge panel made no such assumption,

and the *en banc* opinion provides no explanation for it. From the outset, Phelps Dodge had challenged the existence of a conspiracy among *any* of the defendants:

> The affidavits [submitted in support of Phelps Dodge's motion] prove that these individuals, each within his or her own respective sphere of operations, were independently governed by decisions reached and dictated in the normal course of events by their particular office or position. The affidavits prove in positive and unambiguous terms that (1) there was no conspiracy and no agreement to deprive anyone of his or her rights, and (2) that P[helps] D[odge] was not playing a role in any of their independent functions.

(Motion for Summary Judgment, 25-26). Phelps Dodge cautioned against the very "trap" into which the Ninth Circuit's opinion fell: "the analysis does not start from an assumption or a conclusion of conspiracy. Plaintiffs' Response does so from the very beginning . . . , and it is a trap the Court must avoid." (Reply in Support of Motion for Summary Judgment, 14).

The Ninth Circuit's erroneous assumption of an underlying conspiracy not only relieved plaintiffs of the burden to come forward with evidence on the underlying issue of "the conspiracy," it also severely distorted the court's analysis of the evidence on the second issue of Phelps Dodge's alleged participation. For example, the inferences to be drawn from evidence of the meeting involving Phelps Dodge, Sheriff Dupnik and representatives of the County Attorney's office are very different if one assumes that everyone at the meeting (with the possible

exception of Phelps Dodge) was engaged in a conspiracy to violate the plaintiffs' civil rights, as opposed to requiring *evidence* of such conspiracy. Likewise, the analysis of the warrants issued and bails set by defendant Justice of the Peace Gilmartin will be dramatically different if one assumes that she was engaged in a conspiracy to violate the plaintiffs' civil rights and that the only issue is Phelps Dodge's participation.

The result of this error was a striking circularity in the Ninth Circuit's reasoning. The court held as follows regarding inferences which could be drawn from evidence that the Sheriff advised Phelps Dodge of the list of those he intended to arrest:

> This alone does not constitute sufficient evidence of conspiracy to defeat Phelps Dodge's summary judgment motion. Police may show a list of possible arrestees to a victim for many innocent purposes. But an act done for a legitimate purpose *in furtherance of a conspiracy* may, together with other evidence, be evidence of a conspiratorial purpose.

(App. A-23) (emphasis added). The court thus acknowledged that its assumption of conspiracy colored the inferences it found permissible from otherwise innocent actions. The court went so far as to describe the assumed conspiracy as the "smoking gun" on which its decision against Phelps Dodge was premised:

> Here, the conspiracy is admitted for purposes of this appeal.[2] This conspiracy is the "smoking gun." The

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[2] This misstatement cannot be blamed upon any admission or concession in the briefing on appeal, where Phelps Dodge clearly took the position that there was no evidence of a conspiracy among any of the defendants: "[t]he record is devoid of any evidence of meetings, communications or contacts between anyone which had as their subject matter a deprivation of anyone's civil rights. . . ." Brief for Appellee, p. 35.

> issue is whether the Steelworkers presented enough evidence for a reasonable jury to decide that Phelps Dodge helped pull the trigger.

(App. A-21).

The Ninth Circuit's mere "assumption" of a challenged element of plaintiffs' case, upon which plaintiffs bore the burden of proof, was a clear violation of *Celotex*. The opinion likewise violated the principle of *Liberty Lobby* that a plaintiff cannot avoid summary judgment without identifying specific evidence which would be sufficient to support a verdict in its favor. 477 U.S. at 257. A mere "hope" or possibility that evidence presently undisclosed or unavailable will later come to light is unavailing. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-290 (1968).

The Ninth Circuit's opinion violated *Liberty Lobby* because it apparently disregarded the fact that the evidence adduced by plaintiffs in response to this motion would be the only evidence they had to offer at trial and failed to address whether that evidence alone could support a plaintiffs' verdict. Instead, the court appears to have concluded that the case should go to trial on the possibility that "other" evidence might emerge to support plaintiffs' claims:

> Phelps Dodge argues that all the facts are now presented and that there are no facts proving the conspiratorial connection. It is true that there was no specific admission by a representative of Phelps Dodge that Phelps Dodge was a conspirator. That evidence is seldom available. The disputed fact here will be proven, *if it can be*, by *other* direct and circumstantial evidence. . . . Whether the Steelworkers will succeed in proving their case will need to await a trial.

(App. A-24) (emphasis added). This conclusion was an abdication of the Court of Appeals' responsibility under *Liberty Lobby* to decide as a matter of law whether plaintiffs' case "can be proven" by the evidence now offered. The opinion does not determine whether a jury verdict for plaintiffs would be sustainable on the evidence now of record, yet that is precisely the inquiry which *Liberty Lobby* demands.

II. THE NINTH CIRCUIT'S OPINION WOULD PERMIT INFERENCES OF CONSPIRACY FROM PURELY CIRCUMSTANTIAL EVIDENCE WHICH IS EQUALLY OR MORE INDICATIVE OF NON-CONSPIRATORIAL BEHAVIOR.

There is no direct evidence of any conspiracy. Plaintiffs' case rests entirely on "inferences" from circumstantial evidence of alleged opportunities and motivations for conspiracy. Both the Ninth Circuit and the plaintiffs concede that that evidence is also consistent with non-conspiratorial actions. In evaluating the evidence, however, the Ninth Circuit failed to employ any standard to determine the permissibility of the inferences upon which it relied.

This Court addressed the quantum of evidence required to support inferences of conspiracy in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986). *Matsushita* affirmed summary judgment for the alleged conspirators, rejecting the assertion that the totality of the evidence would support an inference of unlawful antitrust conspiracy.

In discussing inferences premised on circumstantial evidence which was also consistent with innocent activity,

the Court addressed "the range of permissible inferences from ambiguous evidence . . . ." *Id.* at 588. The Court concluded that evidence equally consistent with either lawful or unlawful activity could not support a conspiracy claim, and that in order to avoid summary judgment the plaintiff was required to produce evidence " 'that tends to exclude the possibility that the alleged conspirators acted independently.' " *Id.*, quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). *Matsushita* found fault with the Court of Appeals for failing to consider whether it was "as plausible" to infer that the defendant's behavior was independent and non-conspiratorial. 475 U.S. at 581.

In other words, unless there is something in the evidence which would tip the scales of inference in favor of the plaintiff, he cannot avoid summary judgment merely on the basis of evidence no more indicative of conspiracy than of independent action. *See also, First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968) (the "probative force" of the evidence proposed by plaintiffs was negated by the Court's conclusion that "the inference that [defendant's behavior] was the product of factors other than conspiracy [was] at least equal to the inference that it was due to conspiracy. . ."); and *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626 (9th Cir. 1987) (on motion for summary judgment, conspiracy plaintiff must set forth "specific facts" that tend to exclude the possibility the defendant acted independently).

Matsushita and Cities Service thus require specific facts tending to negate the innocent inference, and it is for the court to determine whether such evidence exists

before permitting the case to go to trial. The jury is not to be given carte blanche to draw whatever inference it prefers from circumstances which are merely consistent with its predilections. Otherwise, the concept of burden of proof is abandoned and replaced by mere speculation.

The Ninth Circuit utilized no such standard in evaluating the evidence here. After substituting an "assumed" conspiracy for a void in the evidence, the opinion proceeds by a series of inferences on inferences and bootstrap arguments. For example, the court concluded that allegations of the legal authorities' disparate treatment of strikers and strikebreakers could, in the context of unspecified "other" evidence, "support an inference of conspiracy between Phelps Dodge and the police." (App. A-23). But where was the evidence from which anyone could conclude that such disparate treatment, even if it occurred, was more likely the product of conspiracy with Phelps Dodge than the independent action of the authorities in response to abuse from the strikers?

The court concedes that evidence of contact between Phelps Dodge and the police might well have been innocent. (App. A-19). Indeed, under the circumstances it would have been unusual had such contact not occurred. The court proceeds, however, to charge that "deference to Phelps Dodge on where to permit picketing indicates Phelps Dodge's substantial influence on matters within police discretion." The court's reasoning is tainted for several reasons.

In the first place, plaintiffs claim no civil rights violation arising out of where picketing was allowed. Therefore, even if Phelps Dodge had some influence on where picketing might take place, this is not evidence of

a conspiracy to cause the very different law enforcement decisions (arrests and bail settings) which plaintiffs claim violated their rights.

Moreover, the record simply does not suggest any impropriety by Phelps Dodge regarding the location of pickets. The evidence was that a sergeant asked a Phelps Dodge employee whether a particular location for pickets was permissible and was told that it was—not that it was not. Plaintiffs' Exhibits in Support of Statement of Facts in Support of Plaintiffs' Supplemental Response to Defendant Phelps Dodge's Motion for Summary Judgment, Statement of Fact No. 12. The only other evidence on the point was a discussion between a Phelps Dodge employee and an officer that strike activities on a particular sidewalk had been prohibited. *Id.* at Statement of Fact No. 13. In the context of the evidence that Phelps Dodge had obtained a preliminary injunction limiting the number and location of pickets and prohibiting interference with access to plant gates (the lawfulness of which is unchallenged), the notion that such a discussion evidences a "conspiracy" is absurd.

All of the evidence was consistent with a conclusion that Phelps Dodge made legitimate requests for action by law enforcement authorities and that the authorities made and carried out their own independent decisions. The question for the court on summary judgment was whether there was any evidence which tended to negate this conclusion. The lesson of *Matsushita, Monsanto, Cities Service, et al.*, is that in the absence of such evidence, plaintiffs had not met their burden of proof, the inference of conspiracy was not permissible, and summary judgment was appropriate.

Several of the cited antitrust cases urge great caution against mistaken inferences of conspiracy, lest they chill the behavior the antitrust law is designed to encourage. This Court should have the same concern for decisions in § 1983 civil rights cases, lest citizens be discouraged from seeking law enforcement assistance for fear of being charged with "conspiracy" to commit any errors the police may make in carrying out their duties. The Ninth Circuit's opinion provides no protection to the outraged victim of crime who urges prompt and decisive action by the police. If the police respond overzealously or incorrectly, is the complainant to be held responsible as a "conspirator"? If not, what is the standard that provides his protection, and what evidence was presented here to satisfy that standard?

The Ninth Circuit mistakenly relied upon this Court's decision in *Adickes v. S.H. Kress and Company,* 398 U.S 144 (1970). Plaintiff Adickes had been refused service at defendant Kress' restaurant because she was a white person in the company of blacks (she was subsequently arrested on a groundless vagrancy charge). At issue on Kress' motion for summary judgment was whether Kress had been acting "under color of" state law for purposes of Adickes' § 1983 claim for deprivation of her civil rights. The Court focused its attention on whether a policeman had been in the store at the time of the refusal of service and whether, if he had been, a permissible inference could be drawn that he and Kress' employee(s) had "conspired" to deprive plaintiff of her civil rights.

In support of its motion for summary judgment, Kress introduced the deposition testimony of the store manager and the affidavits of the two arresting officers

denying any communication between the manager and the officers concerning the incident. Kress did not, however, introduce any evidence to negate the possibility of communication between the officers and the other employee(s) of Kress who actually refused service to Adickes. Adickes, on the other hand, alleged (but apparently produced no admissible evidence) that a policeman had been in the store at the time of the refusal of service. The Court held that in light of the "gap" created by Kress' failure to prove the absence of the policeman and in light of the inference which might be drawn from the policeman's presence in the store, Kress had not met its "burden" on summary judgment, leaving an issue of fact for trial.

The opinion in *Adickes* focused upon Kress' failure to meet its "burden of establishing the absence of a policeman in the store." *Id.* at 160. The Court acknowledged, however, that if Kress had met that burden, for example with affidavits from the police denying presence in the store, plaintiff could not merely have relied on her allegations to the contrary and summary judgment would have been required. *Id.*

It is respectfully submitted that this Court should revisit *Adickes* in light of *Celotex* in order to clear up an apparent conflict between the two which has been perpetuated in the Ninth Circuit's opinion. If the holding in *Celotex* were applied to the circumstances in *Adickes*, it would appear that it would have been sufficient on a motion for summary judgment for Kress to merely challenge the presence of an officer in the store, and that the burden would then have shifted to Adickes to come forward with

evidence of that fact, not *vice versa* as held in *Adickes* and apparently followed by the Ninth Circuit in the instant case. The Ninth Circuit apparently understood *Adickes* in a way inconsistent with *Celotex*, describing this Court's conclusion in *Adickes* as follows: "unless the alleged conspirators foreclosed the possibility of a tacit agreement from which a conspiracy could be inferred, they were not entitled to summary judgment." It is difficult to determine what role this statement of the holding in *Adickes* played in the Ninth Circuit's reasoning, but it suggests enough confusion to require this Court to clarify the continuing effect of the case.

Even more important, *Adickes* requires clarification as to the standard of permissibility of inferences from circumstantial evidence (in that case the presence of an officer in the store). *Adickes* indicates that an inference of conspiracy might be drawn from the officer's presence at the time Kress refused service to the plaintiff. The Ninth Circuit's opinion in the instant case relies heavily upon that part of the *Adickes* opinion but fails to acknowledge a crucial distinction between the two cases.

Defendant Kress faced liability for its own action in refusing service to Adickes on racially discriminatory grounds. The issue was whether Kress' action was carried out "under color of" state law. The presence of an officer in the store at the time who took no steps to prevent the discriminatory act would go a long way toward supporting the inference that the officer condoned and tacitly approved the act—*i.e.* that it was committed under color of state law—because he had both the authority and the duty to protect plaintiff's rights and failed to do so.

Contrast this with a hypothetical situation where a Kress employee was present and stood by while the officer beat Adickes in the store for reasons determined to be racially discriminatory. The same evidence of the presence of both the officer and the Kress employee in the store at the same time would *not* support the inference of a conspiracy under those facts, because the employee would not have been expected to interfere had she disagreed with the officer's action, and her failure to do so therefore would not support an inference of her complicity. In short, the inference of a private/police conspiracy should be more difficult to draw when the tortious action is committed by the police as opposed to the private party.

The facts in the instant case parallel those in the hypothetical situation, because the private defendant, Phelps Dodge, is alleged to be liable for civil rights violations committed by the authorities, not by Phelps Dodge. This different fact pattern should give rise to a higher standard for inferences of conspiracy to be drawn from the relationship between Phelps Dodge and the authorities. The Ninth Circuit made no such distinctions, apparently in reliance on *Adickes*. This Court should therefore clarify *Adickes* both with respect to its interplay with *Celotex* and with respect to the permissibility of inferences of "conspiracy" from the relationship between private and law enforcement defendants in a § 1983 case.

III. THE NINTH CIRCUIT VIOLATED THE STANDARD FOR A PRIVATE PARTY'S LIABILITY UNDER 42 U.S.C. § 1983 WHEN IT IGNORED THE STATUTORY REQUIREMENT THAT THE DEFENDANT MUST HAVE "CAUSED" THE ALLEGED VIOLATION OF THE PLAINTIFF'S CIVIL RIGHTS AND INSTEAD UTILIZED A VICARIOUS LIABILITY STANDARD.

Under the common law, a civil "conspiracy" provides a mechanism under which one party may be held vicariously liable for the actions of another. *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. App. 1983). Liability for common law conspiracy does not require that the defendant participate in the underlying tort, which may be committed by a co-conspirator. *Id.* One conspirator may be held jointly and severally liable for the acts of co-conspirators regardless of the degree of his involvement, and he may even be liable for damages accruing before or after his involvement in the conspiracy. *DeVries v. Brumback*, 53 Cal.2d 643, 349 P.2d 532 (1960). There is thus no requirement that the party to be held liable under a common law civil conspiracy must have participated in, directed or controlled the tortious act.

In contrast, a defendant is liable under § 1983 only if he "subjects [the plaintiff], or causes [the plaintiff] to be subjected," to a deprivation of his or her civil rights, and only if that deprivation is done "under color of" state law. The defendant's liability under this section is therefore direct rather than vicarious. The concept of conspiracy functions only with respect to the "under color of state law" requirement.

The language of § 1983 should be contrasted on this point with the language of 42 U.S.C. § 1985, the section which *does* provide vicarious liability for "conspiracy" to interfere with civil rights. Liability under § 1985 may be vicarious, joint and several among the conspirators and does not depend on whether the particular defendant directed, controlled or participated in the wrongful act. The conspiracy alone is enough: "the party so injured or deprived may have an action . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3).

A party's liability under § 1985 may therefore be triggered merely by participation in the *conspiracy*. In contrast, liability under § 1983 is triggered only by the party's participation in the *tort*. Plaintiffs here did not make any claim under § 1985, nor could they have, because that section applies only to race-based or other invidiously class-based animus and does not reach "conspiracies motivated by bias towards others on account of their *economic* views, status, or activities," including union activities. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 837 (1983) (emphasis in original).

The Ninth Circuit appears to have followed the correct analysis on this point in earlier decisions even though it has not followed it here. In *Arnold v. International Business Machines Corporation*, 637 F.2d 1350 (9th Cir. 1981), the Ninth Circuit affirmed a summary judgment dismissing claims that the defendant employer had conspired with law enforcement authorities to cause criminal charges to be brought against plaintiff employee, in violation of his civil rights. The court acknowledged IBM's heavy involvement with the law enforcement Task Force

which investigated and caused the arrest and indictment of plaintiff; but the court held that in the absence of any evidence that IBM "directed" or "controlled" the "decision-making" of the Task Force, IBM could not be found to have caused any violations of plaintiff's civil rights by the Task Force. *Id.* at 1357. Likewise in *Mann v. City of Tucson, Department of Police,* 782 F.2d 790 (9th Cir. 1986), the Ninth Circuit held that no § 1983 action could be stated against private defendants in the absence of an allegation that they directed or controlled the actions of the police. None of the evidence against Phelps Dodge serves to provide that missing element of control.

In *Adickes, supra,* this Court discussed the level of involvement required for a private party's liability under § 1983 in terms of joint "action" rather than in terms of the broader vicarious liability which might obtain under § 1985:

> "Private persons, *jointly engaged* with state officials *in the prohibited action,* are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant in joint activity* with the State or its agents."

398 U.S. at 152, quoting *United States v. Price,* 383 U.S. 787, 794 (1966) (emphasis added).

As the Ninth Circuit itself noted in *Arnold,* the requirement of the private defendant's control over a governmental actor does not generally arise in § 1983 cases, because the private defendant has usually been the actor who has caused the plaintiff's harm (as in the denial of restaurant service in *Adickes*). In such a case the private defendant has clearly caused the harm, the only issue being

whether he did so "under color" of state law. The issue of control or "causation" instead arises where, as here, the plaintiff's injury was actually carried out by the law enforcement authorities, not by the private defendant, and it must be decided whether the private defendant "caused" the civil rights violation. It is especially important for the courts to articulate and observe the elements of a private party's liability under this fact pattern, lest they chill the public's willingness to enlist aid from the authorities in the enforcement of the law.

IV. THE NINTH CIRCUIT'S OPINION RESTS ON AN UNLAWFULLY LAX STANDARD FOR INFERENCES OF CONSPIRACY, TOGETHER WITH MAJOR ERRORS AS TO THE RECORD.

Most of the evidence in this case establishes nothing more probative than Phelps Dodge's prominent position in the small town where it is the principal employer, its connections with the law enforcement defendants, and its contacts with law enforcement authorities during what the court itself describes as an "explosive" situation involving "huge demonstrations" and "violent confrontations." The opinion acknowledges that, without more, this evidence does not justify an inference of conspiracy by Phelps Dodge. (App. A-19, 21).

The opinion instead turns on the court's patently erroneous assumption (discussed above) of a law enforcement conspiracy. That assumed conspiracy then forms the basis for inferences of Phelps Dodge's participation, but no such inference is permissible.

The opinion focuses on evidence of a meeting at which Phelps Dodge inquired of the Sheriff whether action would

be taken against lawbreaking strikers. The sole evidence on which plaintiffs rely is the deposition testimony of Assistant County Attorney Kathy Casteel, who was present at the meeting. (App. C).

Casteel's testimony gives no indication that Phelps Dodge directed or controlled any decisions of law enforcement authorities. Phelps Dodge asked what action would be taken against people it believed had violated the law and urged their arrest, but there is no indication the Sheriff took direction from Phelps Dodge in deciding whether to seek arrest warrants, or for whom. To the contrary, Ms. Casteel's testimony was that the Sheriff already had a list of proposed arrestees (App. C-6), and there was no indication that the list was changed in any way in response to any comments from Phelps Dodge. Phelps Dodge asked what kind of bond would be sought for arrestees, and the Sheriff stated that he would recommend $15,000.00 apiece. The Sheriff made this as a statement rather than a request for Phelps Dodge's approval, and Ms. Casteel did not recall Phelps Dodge expressing either approval or disapproval of the Sheriff's proposal. (App. C-3).

Phelps Dodge's expressed desire to have strikers "off the streets" was central to the Ninth Circuit's analysis. Ms. Casteel was asked what she understood the comment to mean. Ms. Casteel's understanding of Phelps Dodge's intent was highly significant in this case, because she is alleged to have reached a meeting of the minds with Phelps Dodge to violate the plaintiffs' civil rights. She testified that she did *not* understand it to mean that the arrestees should be put in jail, but rather that they should be "somewhere other than obstructing the traffic into their [Phelps

Dodge's] plant, into their [Phelps Dodge's] mine." (App. C-5). Since she understood Phelps Dodge's position to reflect the legitimate desire to clear the streets for traffic into the plant, she came to no meeting of the minds with Phelps Dodge regarding any unlawful conspiratorial purpose. If she did not conspire with Phelps Dodge, then Phelps Dodge could not have conspired with her. This undermines plaintiffs' entire "conspiracy" claim, since Ms. Casteel, as prosecutor, was the conduit for passing warrant and bail recommendations along to the Justice of the Peace and as such was an indispensable link in the chain of any conspiracy.

By the same token, Phelps Dodge could have no conspiracy liability absent evidence that the Justice of the Peace had conspired as well. A private party incurs no liability under § 1983 unless he "causes" a civil rights violation. A party who institutes legal proceedings against another, even for improper purposes and even if a civil rights violation results, cannot be found to have "caused" a violation if it results from an independent decision by the court. *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959).[3]

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[3] The summary judgment granted for Justice of the Peace Gilmartin on the basis of immunity is also significant. Plaintiffs opposed dismissal of the Justice, arguing that her judicial immunity did not extend to participation in a conspiracy such as alleged here, and that there was sufficient evidence of her conspiracy to keep her in the case. *Citing, e.g., Beard v. Udall,* 648 F.2d 1264 (9th Cir. 1981). It is implicit in the decision granting the Justice's motion that the District Court necessarily found an absence of evidence that she had conspired. Plaintiffs' failure to appeal that judgment rendered it *res judicata* that the Justice had not conspired with anyone to deprive plaintiffs of civil rights. Since participation by the Justice would be an indispensable link in anyone else's liability for a "conspiracy" to cause unlawful arrest warrants to issue and unlawful bail to be set, her dismissal necessarily precluded any liability of Phelps Dodge.

The Ninth Circuit was apparently blinded to this principle by its unwarranted "assumption" of a law enforcement conspiracy, which distracted it from considering the lack of any evidence that the Justice of the Peace, Sheriff and Assistant County Attorneys failed to exercise independent judgment on the issues of bonds and arrests. The plaintiffs were required to produce evidence that each of the alleged law enforcement "conspirators" failed to act independently. The court's assumption was erroneously substituted for the missing evidence on this essential element of plaintiffs' claim against either the law enforcement defendants or Phelps Dodge.

The necessity of evidence that the authorities have failed to exercise independent judgment is also emphasized in *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986). Gramenos had brought a § 1983 claim against a store for causing his wrongful arrest for shoplifting, alleging that the store had conspired with the police to arrest him without probable cause. The store supported its summary judgment motion with deposition testimony from "every significant actor in the case," each of whom denied there was "any arrangement, plan or scheme" for the store to control police decisions. The Seventh Circuit affirmed the grant of summary judgment because

> Gramenos did not present any evidence to pierce these denials—such as evidence that the police have arrested everyone Jewel wanted arrested in the past . . . . A party may not cry "conspiracy" and throw himself on the jury's mercy. Even if the jury should disbelieve all the denials, this would leave Gramenos with no evidence.

Id. at 436.

The Ninth Circuit also erred by confusing "intent" with "conspiracy." The opinion found that Phelps Dodge's "off the streets" comment, coupled with its support for high bail, would justify an inference of Phelps Dodge's "intent to punish the strikers." The Court took the analysis no further, concluding that this was "sufficient to satisfy the standard of *Liberty Lobby*." This analysis was severely deficient.

In the first place, punishment is an inherent and legitimate motivation for any criminal complaint. Furthermore, even assuming that Phelps Dodge thought the offenders should be punished, there can be no conspiracy claim in the absence of evidence of a meeting of the minds between Phelps Dodge and the other defendants on a scheme designed to deprive plaintiffs of their rights, together with action by the authorities directed or controlled by Phelps Dodge. There was no such evidence here and the Ninth Circuit was necessarily unable to point to any.

The Ninth Circuit made its gravest error about the record when it relied upon supposed evidence of a meeting between Justice of the Peace Gilmartin and Phelps Dodge attorneys two days before the arrest warrants were issued. Not even the plaintiffs suggested in the trial court or on appeal that there was evidence of any such meeting. The Court of Appeals apparently combed the file on its own initiative and found among the unsupported allegations put forth by plaintiffs in response to Phelps Dodge's Motion for Summary Judgment one of plaintiffs' own answers to interrogatories (Exh. No. 321). It apparently seized upon that answer as evidence of a "meeting." (App. D).

The allegation in that answer was that one Conrad Florez (not a party) observed Justice of the Peace Gil-

martin and several lawyers for Phelps Dodge entering and leaving the Phelps Dodge office building in Ajo at approximately the same times and that they were jointly in the building for about one-and-a-half hours, just two days before several plaintiffs' arrests. The Ninth Circuit treated this as sufficient evidence that the Justice of the Peace and lawyers met to "conspire." This was patent error. The material was no more than a hearsay allegation in plaintiffs' own answers to interrogatories and was not proper evidence on summary judgment. No plaintiff claimed personal knowledge of such facts, and Mr. Florez provided no affidavit or verification.

More important, the allegation had been proven utterly false during discovery (which would explain why plaintiffs did not raise it in opposition to the summary judgment motion). After plaintiffs prepared their interrogatory answers but before the motion was filed, Mr. Florez was deposed and disavowed the assertion, testifying that *the Justice and lawyers were not in the building at the same time.* (App. E-5, 6, 8). The pertinent deposition testimony, attached as Appendix E, was not previously in the record. It is included now for the first time out of necessity, because it was not until the Ninth Circuit sought out the allegation as support for an inference of "conspiracy" that the issue even arose. Together with the remarkable "assumption" of a conspiracy, this was yet another instance of gross error in dealing with the record. It underscores why this Court should issue its writ of certiorari and give full consideration to this case.[4]

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[4] Such errors also underscore the wisdom of the dissent's concern that the majority failed to accord any deference to the

(Continued on following page)

V. CONCLUSION

The Ninth Circuit's published *en banc* opinion in this case arising out of a major labor dispute threatens to provide an improper precedent on issues both of summary-judgment standards and the substantive law of a private citizen's liability for alleged civil rights violations. These issues are especially sensitive in this case because they involve the limits of citizen liability for seeking law enforcement assistance. It is essential that the correct elements of such liability be clearly articulated, and the Ninth Circuit's opinion fails in that task. For these reasons, Phelps Dodge petitions this Court to issue its writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review, and to summarily reverse, its decision below.

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April, 1989

(Continued from previous page)

trial judge's decision, which was based on greater familiarity with the voluminous record after many months of pretrial proceedings.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United Steelworkers of America; United Steelworkers of America, Local 4776; International Association of Machinists and Aerospace Workers, Lodge No. 1357; International Brotherhood of Electrical Workers, Local 523; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 741; International Union of Operating Engineers, Local 428; United Transportation Union, Local 807; Ronald Rhodes, William Hunter; William Puffer; Diana Pino Vega; Shea Burkhead; Amado Gonzalez; Art Galvez; Antonio Santiago; David Williams; Jose Ortiz; Richard Olea; Jerry Wolgamuth; Natalie Munoz; Soila Bon; George Bustamante, individually and on behalf of others similarly situated,	No. 86-2811
Plaintiffs-Appellants,	D.C. No. CV 83-589-ACM
v.	OPINION

Phelps Dodge Corporation, a New York corporation; Arizona Department of Public Safety; R.L. Carson, individually and as an Arizona Department of Public Safety Officer; Helen Gilmartin; Pima County, Arizona, a political subdivision of Arizona; Clarence Dupnik, individually and as Pima County Sheriff; J.W. Bowman, individually and in official capacity; R. Benson, individually and in official capacity; C. Kaylor, individually and in his official capacity; John Doe Jett, individually and in official capacity; Dan Ludwickzak, individually and in his official capacity; John Gilmartin, individually and in his official capacity; Ron Lee, individually and in his official capacity; David Allen, individually and in his official capacity; Geoffrey Cheadle, Jr., individually and in his official capacity; Kathy Casteel, individually and in her official capacity; Rita Jett, individually and in her official capacity; James Sheets,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge Presiding

Argued En Banc and Submitted
September 20, 1988—San Francisco, California

Filed January 18, 1989

Before: Goodwin, Chief Judge, Wallace, Tang, Schroeder, Fletcher, Norris, Reinhardt, Beezer, Thompson and O'Scannlain, and Trott, Circuit Judges.

Opinion by Judge Wallace; Dissent by Judge Trott, in which Beezer, Circuit Judge, joins in parts I, II, and III.

SUMMARY

Criminal Procedure

Reversing the district court's order of summary judgment, the appeals court, en banc, held that there was sufficient direct and circumstantial evidence to support trial on the issue of conspiracy by a private party with state agency.

During a bitter strike, several striking employees of Phelps Dodge Corporation were arrested and charged with felonies with relatively high bails set. The United Steelworkers of America, among many unions representing the Phelps Dodge employees, sued Phelps Dodge, Pima County, the sheriff, individual deputies, the Arizona Department of Public Safety, individual officers, County Attorney's Office attorneys, and the Ajo Justice of the Peace for conspiracy to deprive the strikers and their supporters of their constitutional rights due to discriminatory enforcement of the law, arrests without probable cause, and excessive bail. After the State departments, officers, Justice of the Peace and attorneys were dismissed, the district court granted Phelps Dodge's motion for summary judgment. On appeal, the Steelworkers contended that sufficient evidence of a conspiracy was presented to require a jury trial because Phelps Dodge acted as a private party participating in a conspiracy under color of law.

[1] After analysis of the facts in the light most favorable to the Steelworkers, the court concluded that the

evidence presented, if believed by a jury, would be sufficient to prove close relations between Phelps Dodge and the state actors. The question remained as to whether the jury could properly infer therefrom that Phelps Dodge was a co-conspirator. [2] Although the court agreed that cooperative assistance with local law enforcement agencies is not evidence of a conspiracy, the court believed that there was more than simple cooperative involvement by Phelps Dodge. [3] The court pointed out that Phelps Dodge wanted the police to arrest strikers and "keep them off the streets," quite possibly off "all" streets, which goes beyond mere protection of workers and property. Thus, this evidence may be viewed as Phelps Dodge's own confession of its intent and is unusually probative, going to the critical issue of the case: whether Phelps Dodge intended to violate the strikers' civil rights. Because the strikers were actually arrested a few weeks later, this evidence takes on additional significance as direct evidence that Phelps Dodge was a participant in the conspiracy. [4] Upon review of further inferential evidence, the court determined that drawn all together, they were of sufficient quantum and quality to create a genuine issue of material fact as to Phelps Dodge's participation in the conspiracy. Thus, the court reversed the district court's ruling in favor of summary judgment.

Judge Trott, joined in certain parts by Judge Beezer, dissented for four reasons with extensive analysis. The first was the majority's failure to differentiate between conduct causing other conduct and an agreement to violate the law. Second, the majority relied too heavily on words spoken at a post-riot meeting where opinion was stated

that the arrestees should be taken off the street. Third, the majority has created difficulties for people attempting to work with law enforcement agencies. And, fourth, the majority failed to give deference to the trial judge's view of the facts and inferences that might be legitimately drawn therefrom.

COUNSEL

Bruce R. Lerner, Bredhoff & Kaiser, Washington, D.C. for the plaintiffs-appellants.

James G. Speer, Evans, Kitchel & Jenckes, P.C., Phoenix Arizona, for the defendants-appellees.

OPINION

WALLACE, Circuit Judge:

Following a bitter strike, unions representing employees of a Phelps Dodge Corporation facility (Phelps Dodge) and certain individuals (collectively the Steelworkers) sued Phelps Dodge, law enforcement officials and others for conspiracy to violate the civil rights of the Steelworkers. After dismissing some defendants, the district court granted summary judgment for Phelps Dodge, and judgment was entered pursuant to Fed. R. Civ. P. 54(b). The Steelworkers appealed, and a panel of this court affirmed. The appeal was subsequently taken en banc.

The district court had jurisdiction pursuant to 28 U.S.C. § 1343, and we have jurisdiction under 28 U.S.C. § 1291. We reverse the judgment of the district court and

remand the action for further proceedings. The opinion of the three-judge panel, reported at 833 F.2d 804 (9th Cir. 1987), is withdrawn.

I

The background of this appeal was succinctly stated in the panel opinion:

> Phelps Dodge owns and operates a copper mine and milling plant in Ajo, a few miles south of Tucson. In 1983, the unions representing those employees went on strike. By all accounts the strike was bitter, dividing the town and resulting in violence by both strikers and non-strikers. Huge demonstrations and violent confrontations met the company's attempt to replace the strikers. In this explosive situation both Pima County Sheriff's Department Officers, and Arizona Public Safety Officers were called to Ajo.
>
> During the strike, several strikers were arrested and charged with felonies. Bail was set as $15,000 for each. When they could not post bail they were jailed in nearby Tucson. Other strikers were arrested or cited and charged with misdemeanors.
>
> The Steelworkers sued Phelps Dodge, Pima County, the Sheriff and individual Deputies, the Arizona Department of Public Safety and individual officers, individual attorneys of the County Attorney's Office, and the Ajo Justice of the Peace for conspiracy to deprive the strikers and their supporters of their constitutional rights in violation of 42 U.S.C. § 1983. They alleged discriminatory enforcement of the law, arrests without probable cause, and excessive bail.
>
> The State Department of Public Safety and its officers, the Justice of the Peace, and the attorneys were dismissed. The district court then granted summary judgment and costs for Phelps Dodge. The Steelworkers appealed, contending that sufficient evidence of a conspiracy was presented to require a jury trial.

United Steelworkers of America v. Phelps Dodge Corp., 833 F.2d 804, 805 (9th Cir. 1987).

We review the entry of summary judgment independently. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). We are governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Id.* Under that standard, summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, the crucial question before us is whether the evidence presented by the Steelworkers, together with permissible inferences drawn from that evidence, is sufficient to establish a "genuine issue as to any material fact."

II

The Steelworkers contend that a genuine issue exists as to whether Phelps Dodge was part of a conspiracy to deprive the strikers of their civil rights in violation of 42 U.S.C. § 1983. Actions may be brought pursuant to 42 U.S.C. § 1983 to redress constitutional violations under color of state law. Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (*Adickes*); *United States v. Price*, 383 U.S. 787, 794 (1966); *Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983) (*Fonda*). Private parties involved in such a conspiracy may be liable under section 1983. *Adickes*, 398 U.S. at 152.

To prove a conspiracy between the state and private parties under section 1983, the Steelworkers must show "an agreement or 'meeting of the minds' to violate constitutional rights." *Fonda,* 707 F.2d at 438; *see Adickes,* 398 U.S. at 158. To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy. *Fonda,* 707 F.2d at 438. Evidence that police failed to exercise independent judgment will support an inference of conspiracy with a private party. *See Gramenos v. Jewel Companies, Inc.,* 797 F.2d 432, 435-36 (7th Cir. 1986) (police agreement to arrest anyone designated by shopkeeper constitutes conspiracy), *cert. denied,* 107 S. Ct. 1952 (1987); *Moore v. Marketplace Restaurant, Inc.,* 754 F.2d 1336, 1352-53 (7th Cir. 1985) (same).

Whether the Steelworkers have proven the existence of a conspiracy to deprive them of their civil rights is not before us. We assume for purposes of this appeal that such a conspiracy did exist and did violate their civil rights. We have before us only the narrow issue of whether the Steelworkers have alleged enough evidence that Phelps Dodge was in fact a participant in this conspiracy to defeat a motion for summary judgment. We first discuss the standard that the Steelworkers must satistfy to defeat a summary judgment motion. We then consider whether the Steelworkers have satisfied this standard.

A.

The Steelworkers rely primarily on *Adickes.* The Court there concluded that unless the alleged conspirators foreclosed the possibility of a tacit agreement from which

a conspiracy could be inferred, they were not entitled to summary judgment. 398 U.S. at 157. *Adickes* involved a white schoolteacher who was refused service in a public restaurant while in the company of several of her black students. As she left the restaurant, she was arrested for vagrancy by local police. Adickes brought a section 1983 claim against the restaurant, alleging that the refusal to serve her and her subsequent arrest were products of a conspiracy between a private individual (Kress) and a governmental entity (local police). The district court granted summary judgment against Adickes, ruling that she "failed to allege any facts from which a conspiracy might be inferred." *Adickes v. S.H. Kress & Co.*, 252 F. Supp. 140, 144 (S.D.N.Y. 1966). The court of appeals affirmed. *Adickes v. S.H. Kress & Co.*, 409 F.2d 121, 126-27 (2nd Cir. 1968).

The Supreme Court reversed, ruling that the alleged conspirators had failed to negate inferences that could be drawn from the presence of a policeman inside the restaurant while Adickes was awaiting service. Although the store manager's deposition claimed that he had not seen or communicated with a policeman, there were no affidavits from two other employees present in the store at the time. Thus, Kress "did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while [Adickes] was awaiting service, and that this policeman reached an understanding with some Kress employee that [Adickes] not be served." *Adickes*, 398 U.S. at 157. The Court held that there was circumstantial evidence of a conspiracy, and the "unexplained gaps" in the record were held against Kress because, as the moving party, it had the initial burden to

show affirmative evidence of the nonexistence of a material fact in dispute. *Id.*

If the Supreme Court had given no further guidance, we would decide this appeal based on whether Phelps Dodge had foreclosed the possibility of the existence of facts from which an inference of conspiracy could be drawn. Phelps Dodge would have the burden of showing the absence of a genuine issue as to any material fact, and any unexplained gaps in the record would be held against it. *Id.* But the Supreme Court has given additional guidance in two subsequent decisions: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (*Liberty Lobby*), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (*Celotex*).

In *Liberty Lobby*, the Court held that when a defendant moves for summary judgment, the trial court must determine from the record whether "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.* at 252. The possibility that the plaintiff may discredit the defendant's testimony at trial is not enough for the plaintiff to defeat a properly presented motion, "the plaintiff need only present [affirmative] evidence from which a jury might return a verdict in his favor." *Id.* at 257. If from the evidence presented a jury could "reasonably find *either* that the plaintiff proved his case *or* that he did not," *id.* at 254 (emphasis in original), summary judgment must be denied.

Liberty Lobby focuses the district court's attention on the "actual quantum and quality of proof necessary to support liability" at trial. *Id.* at 254. Mere submission of affidavits opposing summary judgment is not enough; the court must consider whether the evidence presented in the

affidavits is of sufficient caliber and quantity to support a jury verdict for the nonmovant. *Id.* A "*scintilla* of evidence," or evidence that is "merely colorable" or "not significantly probative," is not sufficient to present a genuine issue as to a material fact. *Id.* at 249-50, 252. The trial court, however, must keep in mind that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge . . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. A "justifiable inference" is not necessarily the most likely inference or the most persuasive inference. Rather, "an inference as to another material fact may be drawn in favor of the nonmoving party . . . if it is 'rational' or 'reasonable.'" *T.W. Electrical Service v. Pacific Electrical Contractors,* 809 F.2d 626, 631 (9th Cir. 1987) (*T.W. Electrical*). Of course, the inference drawn must be one permitted under the governing substantive law. *Id.* This approach to evaluating a summary judgment motion is similar to the inquiry courts make to determine the appropriateness of a directed verdict pursuant to Fed. R. Civ. P. 50(a). *Liberty Lobby,* 477 U.S. at 250-52.

As a defamation action, the substantive law in *Liberty Lobby* required the plaintiff to prove certain elements of its case with "clear-and-convincing evidence"—a heightened standard of proof. The approach announced by *Liberty Lobby* applies equally to "run-of-the-mill" civil cases which involve the preponderance-of-the-evidence standard. *Id.* at 252. Thus, *Liberty Lobby's* focus on the sufficiency of the evidence at trial applies to summary judgment mo-

tions in all civil cases, and not just those which, like *Liberty Lobby*, involve the heightened "clear-and-convincing evidence" standard. *Id.* at 252-53; *see, e.g., Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 922-23 (9th Cir. 1987) (summary judgment appropriate if no reasonable juror could find for the plaintiff by a preponderance of the evidence (*citing Liberty Lobby*)). Indeed, the Court showed how conspiracy cases such as *Adickes* and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), fall within the rule. *Liberty Lobby*, 477 U.S. at 249; *see also T.W. Electrical*, 809 F.2d at 630-31 (applying *Liberty Lobby* rule to summary judgment motion in conspiracy case).

Celotex was decided the same day as *Liberty Lobby*. Whereas *Liberty Lobby* focused on the quantum and quality of evidence required to withstand summary judgment, *Celotex* emphasized the allocation of burdens of proof. The Court held that on an issue where the plaintiff has the burden of proof, the defendant may move for summary judgment by pointing to the absence of facts to support the plaintiff's claim. 477 U.S. at 322-23. The defendant is not required to produce evidence showing the absence of a genuine issue of material fact with respect to an issue where the plaintiff has the burden of proof. *Id.* at 325. Nor does Rule 56(c) require "that the moving party support its motion with affidavits or other similar materials *negating* the nonmoving party's claim." *Id.* at 323 (emphasis in original).

In *Celotex*, the court of appeals had relied on *Adickes* to reverse the entry of summary judgment by the district court. The Court held that the *Adickes* language relied on by the court of appeals

> should [not] be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing" —that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

Id. at 325.

Here, the burden of proof was on the Steelworkers to prove that Phelps Dodge was a part of the conspiracy. Phelps Dodge, in moving for summary judgment, needed only point to shortfalls in the Steelworkers' case to demonstrate the absence of evidence connecting it to the conspiracy. The Steelworkers concede that Phelps Dodge met this responsibility in moving for summary judgment. Unless the Steelworkers presented sufficient evidence to demonstrate that there was a triable issue of fact as to Phelps Dodge's connection to the conspiracy, Phelps Dodge was entitled to summary judgment. We therefore must determine whether the Steelworkers presented "concrete evidence from which a reasonable jury could return a verdict in [their] favor." *Liberty Lobby,* 477 U.S. at 256.

B.

The Steelworkers contend that their evidence is sufficient to raise a genuine issue as to Phelps Dodge's connection to the conspiracy, and thus defeat Phelps Dodge's summary judgment motion. Their argument rests on four principal lines of evidence: (1) Phelps Dodge's powerful position in the small community of Ajo, and its close rela-

tionship with law enforcement officials involved in the strike; (2) the August 11, 1983, meeting between Phelps Dodge executives and various law enforcement officials, and the events which followed the meeting; (3) the unequal treatment by law enforcement officials of strikers and strikebreakers; and (4) active contact and cooperation between Phelps Dodge and law enforcement officials during the strike. We review the evidence in the light most favorable to the Steelworkers. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

1.

The Steelworkers point to many aspects of Phelps Dodge's powerful position in the community of Ajo. Phelps Dodge is Ajo's predominant employer. Phelps Dodge owns most of the property in Ajo, including virtually all available rental housing. Through Phelps Dodge Mercantile Company (Phelps Dodge Mercantile), Phelps Dodge also operates a company store.

Many individuals who played a role in breaking up the strike had significant ties to Phelps Dodge. The Ajo Justice of the Peace, who issued the arrest warrants in this case, was on furlough from her job as a Phelps Dodge security guard and could have returned to this job at any time with full seniority. She obtained her judicial position through a nomination by Phelps Dodge's security chief. Her car bore the personalized license plates "PD AJO," which stood for "Phelps Dodge Ajo." Both Phelps Dodge and the Pima County Sheriff's Department (Sheriff's Department) employed her close relatives. She lived in housing rented from Phelps Dodge.

Numerous Sheriff's Department deputies likewise lived in houses or apartments rented from Phelps Dodge. Spouses and relatives of several deputies worked for Phelps Dodge and some worked as strikebreakers during the strike. Several deputies were former Phelps Dodge employees.

2.

The Steelworkers rely most heavily on a meeting which took place on August 11, 1983, at Phelps Dodge, as described in the deposition of Deputy Pima County Attorney Casteel. Those present at the meeting included Casteel, Sheriff Dupnik and Lieutenant Garchow of the Sheriff's Department, and Phelps Dodge's Plant Manager, Labor Relations Manager, and Director of Security. Two days before the meeting, strikers for the first time had blocked the entrances to the Phelps Dodge plant gate and mine gate, preventing any shift change for a period of 36 hours. The police ordered the road closed. On the day before the meeting, there was a near-confrontation between strikers and a large contingent of Sheriff's Department and Arizona Department of Public Safety officers. The incident led to negotiations between union leaders Sheriff Dupnik resulting in a truce. Union leaders persuaded the strikers to disperse, and a shift change was permitted.

At the August 11 meeting, the Phelps Dodge representatives asked whether the police intended to take any action against the strikers who had damaged property and violated the law. Sheriff Dupnik responded that arrests would be made, although the police had not yet completed the list of those to be arrested, determined the charges, or secured the warrants. A Phelps Dodge representative

asked about the bail for the strikers, and indicated that in view of the "circumstances" and "severity" of the charges, he hoped bond would be "set high." He said that he "wanted those people off the streets." At some point, Sheriff Dupnik said that he planned to request $15,000 bail for each striker. Sheriff Dupnik had a partial list of the strikers for whom he hoped to secure warrants. After the discussion of bail, Dupnik went over that list with the representatives of Phelps Dodge.

The Steelworkers argue that the meeting resulted in numerous irregularities that surrounded the arrests of certain strikers. They contend that in light of this meeting, the preparation of the warrants, the actual decision to arrest, and the setting of bail constitute important evidence which could support a finding of Phelps Dodge's connection to the conspiracy. For example, after the meeting at Phelps Dodge, Casteel met with three Sheriff's Department officers and, thereafter, she and two of these officers went to the office of the Justice of the Peace to obtain the warrants, based on complaints signed by a representative of the County Attorney. The justice made no probable cause determination, and received no sworn testimony from the officers. The warrants were nevertheless prepared, but held by the justice for two weeks, when she changed the date and then signed the warrants.

During the two weeks the justice held the warrants, there were no confrontations between strikers and police officers. Indeed, the police began reducing their forces, and the Pima County Attorney told the press that "we'd like to have things simmer down and not have to charge anyone with felonies" for the events of August 9.

Two days before the warrants were issued, Phelps Dodge lawyers and the Justice of the Peace entered the main Phelps Dodge office building within 20 minutes of each other. About an hour and a half later, the justice and certain police officers left, followed shortly by the lawyers.

Sheriff Dupnik met with the Phelps Dodge Manager and Directory of Security at Phelps Dodge on the date the arrest warrants were issued or the day before. Phelps Dodge acknowledges that the purpose of the meeting was to discuss the arrests of the strikers. The date the warrants were issued is the sole day for which Phelps Dodge could not produce its log of daily contacts between its security officers and the Sheriff's Department.

The Justice of the Peace also followed unorthodox procedures in setting $15,000 bail for those arrested. She made no effort to individualize bail according to community ties, ownership of property in Ajo, ability to pay, likelihood of appearance, or whether an individual had turned himself in. Nor did she inquire, as she normally would, whether the strength of the case against each individual warranted bail in that amount.

3.

The Steelworkers argue that evidence of different treatment by police of strikers and strikebreakers supports the inference of conspiracy between law enforcement officials and Phelps Dodge. The Steelworkers detail many examples of alleged disparity including inconsistent handling of telephone harassment claims, notably the furnishing of phone "grabbers" to trace calls made to strike-

breakers but not to strikers; release on his own recognizance of a strikebreaker who committed an assault on a striker while burdensome bail was generally imposed on strikers; imposition of bail on strikers in excess of the maximum fine allowed for the misdemeanor charged; failure to investigate certain incidents involving use of guns by strikebreakers; failure to enforce traffic rules against strikebreakers; and failure to investigate and act on positive identification (by strikers) of strikebreakers engaged in public indecency and tire slashing.

4.

The Steelworkers also offered evidence of the close working relationship between Phelps Dodge and law enforcement personnel during the strike. These included regular radio contact between Phelps Dodge and other law enforcement personnel; sharing of intelligence; daily contact at the picket line area; and regular meetings. Phelps Dodge provided videotapes of strikers' activities to assist in identifying lawbreakers. Sheriff Dupnik stated that his department had a "close working relationship" with Phelps Dodge security personnel. In fact, when the strike began, Phelps Dodge Mercantile established a charge account for the Sheriff's Department so that deputies on temporary assignment to Ajo during the strike could charge their meals at the company store.

The Steelworkers also produced evidence indicating that police relied on Phelps Dodge security personnel for instruction as to where the strikers should be allowed to picket. Police followed the Phelps Dodge Security Manager's instructions not to enforce violations by strikebreakers of the stop sign outside the Phelps Dodge en-

trance. On the day that warrants to arrest strikers were issued, the police met with Phelps Dodge to discuss the arrests.

III

[1] The evidence presented, in the light most favorable to the Steelworkers would, if believed by a jury, be sufficient to prove close relations between Phelps Dodge and the state actors. The question is whether the jury could properly infer from these concrete facts that Phelps Dodge was a co-conspirator.

A court evaluating a summary judgment motion must consider all "justifiable" and "legitimate" inferences in the nonmoving party's favor. *Matsushita Electric v. Zenith Radio,* 475 U.S. 574, 587-88 (1986) (*Matsushita*). Inferences may be drawn from underlying facts not in dispute such as background or contextual facts, as well as from disputed underlying facts which the judge must assume will be resolved at trial in favor of the nonmovant. *T.W. Electrical,* 809 F.2d at 631.

Phelps Dodge argues that it was confronted with a dangerous and potentially volatile situation requiring police protection. It contends that assisting the police in this protective effort is no violation of the Steelworkers' civil rights. We agree. Indeed, citizens are properly urged to cooperate with law enforcement agencies when crime or civil disobedience is threatened. As we made clear in *Arnold v. International Business Machines,* 637 F.2d 1350 (9th Cir. 1981), such cooperation does not prove conspiratorial conduct. There, the company cooperated with the police in investigating the possible theft of documents by an employee. Meetings between the company and repre-

sentatives of law enforcement agencies, the district attorney, and the attorney general occurred. A cooperative investigation resulted. We affirmed the entry of summary judgment by the district court of the employee's action alleging a civil rights violation. We described the company's involvement as follows:

> It is undisputed that IBM had some involvement with the Task Force. The Task Force would not have existed but for IBM. IBM brought the information concerning possible criminal activity to the authorities. IBM turned over to the Task Force the information that it had gathered concerning the possible leaks of trade secrets during its own investigation. An IBM employee, Callahan, was a member of the Task Force. The Task Force relied heavily, perhaps exclusively, on IBM personnel in determining what information constituted trade secrets, and what documents were IBM documents. The district attorney relied on IBM attorneys to provide appropriate witnesses to testify before the grand jury. IBM supplied the Task Force with "buy money" to enable Bourget to purchase documents and information from the suspected thieves, while under surveillance. IBM also provided the Task Force with money for expenses incurred during the course of the investigation that could not be covered by the local budget. IBM also rented an airplane that was used by members of the Task Force for travel during the course of the investigation. It is clear that "but for" IBM's involvement, there would have been no investigation, and Arnold never would have been arrested or indicted or had his residence searched.

Id. at 1357. There was no evidence in *Arnold* "that would tend to show that [the company] had some control or power over the Task Force, [or] that [the company] directed the Task Force to take action against Arnold. . . ." *Id.* at 1356. Yet, we concluded, summary judgment was proper.

[2] Here, too, there is abundant evidence of cooperative involvement between Phelps Dodge and law enforcement agencies. The question is, is there more? We believe there is. Here, the conspiracy is admitted for purposes of this appeal. This conspiracy is the "smoking gun." The issue is whether the Steelworkers presented enough evidence for a reasonable jury to decide that Phelps Dodge helped pull the trigger.

[3] At the August 11 meeting, Phelps Dodge did not merely agree to cooperate in an investigation. It did not merely provide the police with useful information. It did not merely ask that its gates be opened and its property and workers be protected. If that were all Phelps Dodge requested, this case would be like *Arnold*. Phelps Dodge, in contrast, wanted the police to arrest strikers and "keep them off the streets." A reasonable jury could infer that this was not a request to keep strikers off the street in front of the plant, but off "the streets"—all streets. Keeping strikers off all streets goes beyond protection of workers and property. It reflects an intent to punish the strikers. Nor is this all. Phelps Dodge further suggested that the police keep the strikers off the streets by setting high bail. A reasonable jury could infer that this reflects an intent to punish the strikers. This evidence is sufficient to satisfy the standard of *Liberty Lobby*. It is not just a "scintilla of evidence" or evidence that is "merely colorable" or "not significantly probative." *Liberty Lobby*, 477 U.S. at 249-50, 252. This evidence may be viewed as Phelps Dodge's own confession of its intent. It is unusually probative. It is not evidence of a collateral matter, but goes to the most critical issue in the case; whether Phelps Dodge intended to violate the strikers' civil rights.

Moreover, this evidence takes on additional significance given that Phelps Dodge's requests came to fruition several weeks after the meeting. Based on this direct evidence, a jury could infer that Phelps Dodge was a participant in the conspiracy. Thus, this evidence is of the "quantum and quality of proof necessary to support liability" at trial. *Id.* at 254.

This direct and highly probative evidence makes the inferences that can be drawn from the abundant circumstantial evidence all the more "justifiable" and "legitimate." *Matsushita,* 475 U.S. at 587-88. Phelps Dodge's powerful stature in Ajo, combined with its repeated contacts with the police, provide "undisputed background or contextual facts," *T.W. Electrical,* 809 F.2d at 631, from which the jury could legitimately draw inferences. The jury would be justified in inferring that Phelps Dodge had both the ability and the opportunity to conspire with the police. The ability and opportunity to conspire, while insufficient alone, constitute circumstantial evidence of actual participation in the conspiracy. *See Adickes,* 398 U.S. at 158. This circumstantial evidence does not stand alone, but rather serves to buttress the direct evidence and the permissible inferences arising from it.

The conduct of the Justice of the Peace in issuing warrants without probable cause immediately following the August 11 meeting might be capable of innocent interpretation. The peculiar timing and aberrant procedure surrounding the writing of the warrants, however, would support a justifiable inference of conspiracy. Moreover, the Justice of the Peace did not issue the warrants until after yet another meeting with Phelps Dodge attorneys at the Phelps Dodge plant. Although susceptible of innocent

interpretation, this too would support a justifiable inference of conspiracy. The same may be said of the Justice of the Peace's unusual decision to set uniform bail.

The inferences that can be drawn from actions of the Justice of the Peace are bolstered by Phelps Dodge's viewing of the list of those Sheriff Dupnik planned to arrest, and its opportunity to offer its ideas on the composition of the list before the arrests occurred. This alone does not constitute sufficient evidence of conspiracy to defeat Phelps Dodge's summary judgment motion. Police may show a list of possible arrestees to a victim or witness for many innocent purposes. But an act done for a legitimate purpose in furtherance of a conspiracy may, together with other evidence, be evidence of a conspiratorial purpose. *Braverman v. United States*, 317 U.S. 49, 53 (1942).

The demonstrated disparate treatment of strikers and strikebreakers standing alone would not be sufficient evidence of a conspiracy. However, when viewed together with the other evidence offered by the Steelworkers, such evidence could also support an inference of conspiracy between Phelps Dodge and the police. The same can be said of the frequent contact between Phelps Dodge and the police, although the deference to Phelps Dodge on where to permit picketing indicates Phelps Dodge's substantial influence on matters within police discretion.

[4] The inferences that can be drawn from all of this direct and circumstantial evidence, taken together, are of sufficient "quantum and quality" to create a genuine issue of material fact, *Liberty Lobby*, 477 U.S. at 254: whether Phelps Dodge participated in the conspiracy. Phelps Dodge argues that all the facts are now presented and that there

are no facts proving the conspiratorial connection. It is true that there was no specific admission by a representative of Phelps Dodge that Phelps Dodge was a conspirator. That evidence is seldom available. The disputed fact here will be proven, if it can be, by other direct and circumstantial evidence. *See Adickes,* 398 U.S. at 158; *Hampton v. Hanrahan,* 600 F.2d 600, 621 (7th Cir. 1979), *rev'd in part on other grounds,* 446 U.S. 754 (1980); *Crowe v. Lucas,* 595 F.2d 985, 993 (5th Cir. 1979). Here, the direct and circumstantial evidence were sufficient to require the fact finder to make a decision. Whether the Steelworkers will succeed in proving their case will need to await a trial. We hold only that they may try to do so.

REVERSED.

TROTT, Circuit Judge, dissenting, in which BEEZER, Circuit Judge, joins in parts I, II, and III:

I write in dissent for four reasons. First, in my judgment, the majority's opinion does not adequately differentiate between conduct that *causes* other conduct, and an *agreement* to violate or to disregard the law. The latter, of course, is the essence of a conspiracy; the former is not. I am concerned, with all due respect, that although the majority is clearly saying "conspiracy," it may nevertheless be thinking "causation."

Second, the majority, in arriving at its conclusion, gives too much importance to a handful of words spoken at a post-riot meeting attended by representatives of Phelps Dodge, command level of law enforcement, and the County Attorney's office. Phelps Dodge, in the shadow of considerable unrest and violence surrounding its attempt to keep its business open, not surprisingly asked at this meeting whether arrests would be made. When the answer was in the affirmative, Phelps Dodge opined that if so, bond should be set high enough to keep the arrestees off the street. Even viewed in the context of all the facts and circumstances surrounding this case, which apparently aren't enough collectively to carry the day, these words are hardly proof of a conspiratorial agreement.

Third, I am concerned that we improvidently create difficulties for people honestly attempting to work with public authorities to restore the rule of law during a public disorder.

And fourth, I am troubled by the manner in which we review the decision of the trial court, according no deference whatsoever to his view of the facts and the inferences that might be legitimately drawn therefrom.

I

Conspiracy v. Causation

Phelps Dodge is a private entity. It can be brought into this cause of action—which requires a showing of state action—only by proving that Phelps Dodge was part of a conspiracy, not merely that Phelps Dodge caused something to happen.

This is the teaching of *Fonda v. Gray*, 707 F.2d 435 (9th Cir. 1983), in which we stated:

> Section 1983 actions may be brought to redress constitutional violations effected under color of state law. A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one's constitutional rights. *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156-57, 16 L.Ed.2d 267, 272 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142, 151 (1970).
>
> * * *
>
> To prove a conspiracy between private parties and the government under § 1983, *an agreement or 'meeting of the minds' to violate constitutional rights must be shown. Adickes, supra*, 398 U.S. at 152, 158, 90 S.Ct. at 1609, 26 L.Ed.2d at 151, 155. . . . While it is not necessary to prove that each participant in a conspiracy know the exact parameters of the plan, they must at least share the general conspiratorial objective.

Fonda, 707 F.2d at 437-38 (citations omitted) (emphasis added). Although the majority opinion pledges fidelity to *Fonda*, in its analysis it gives the appearance of marching to the beat of a different drummer.

The source of this problem is found in *Arnold v. International Business Machines,* 637 F.2d 1350, 1356-57 (9th Cir. 1981), where the analysis of the private party-state action issue was handled in terms of whether the private defendants "proximately caused" the constitutional deprivation. In so doing, the court in *Arnold* came to the correct result, but I believe respectfully that it did so by posing and answering the wrong question. The question was not whether IBM had "proximately caused" the constitutional deprivation, but whether IBM had *conspired* with the police to deprive the plaintiff of a constitutional right. The court in *Arnold* viewed the term "proximate cause" as virtually synonymous with "conspiracy," but the two are markedly different and are not suspectible of such a marriage. What gets lost in this union is the requirement of a conspiracy that it be shown that the parties entered into an *agreement* to violate or to disregard the law. The use of the term "proximate cause" in this context, therefore, may tend to lead one down the wrong path with the wrong flashlight looking for the wrong quarry.

Under similar circumstances, the shared unlawful intent requirement was emphasized in *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970):

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow *reached an understanding* to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest *because* she was a white person in the company of Negroes.

> The involvement of a state official in *such a conspiracy* plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful . . . . Moreover, a private party involved in *such a conspiracy,* even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute, to act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.'

Adickes, 398 U.S. at 152 (citations omitted) (emphasis added).

E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* § 103.23 (4th ed. 1987) (Devitt, Blackmar & Wolff) sets forth the test for determining whether certain evidence proves the existence of a conspiracy under these circumstances. This is a test carefully distilled from controlling case law. The pertinent jury instruction reads in relevant part as follows:

> § 103.23 Conspiracy to Interfere With Civil Rights—Existence of a Conspiracy
>
> A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member. *The essence of a conspiracy is a combination or agreement to violate or to disregard the law.*
>
> Mere similarity of conduct among various persons and the fact that they may have associated with each

other and may have assembled together and may have discussed some common aims and interests, is not necessarily proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner, or through some contrivance, positively or tacitly came to a *mutual understanding to try to accomplish a common and unlawful plan.*

The evidence in the case need not show that all the means or methods set forth in the plaintiff's complaint were agreed upon to carry out the alleged conspiracy, nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were members of said conspiracy.

* * *

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before the jury may find that a defendant has become a member of a conspiracy, it must be shown by a preponderance of the evidence that the conspiracy was knowingly formed, and that the defendant who is claimed to have been a member *knowingly participated* in the unlawful plan *with the intent to advance or further some object or purpose of the conspiracy.* To act or participate knowingly means to act or participate voluntarily and intentionally and not because

> of mistake, accident or other innocent reason. [Emphasis added].

Webster's Third New International Dictionary (1976) defines "concerted" as something that is "mutually contrived or planned: agreed on."

The term "proximate cause" is nowhere to be found in this instruction, and the reason for its absence is simple: It doesn't belong there.[1]

The record in this case amply and without ambiguity supports the proposition that law enforcement in Arizona reacted directly to perceived pressure from Phelps Dodge, and they may have so reacted because this was a "company town." Cause and effect are shown, but that is all. As I assess them, the so-called inferences of an "agreement to violate or to disregard the law" in this case are wholly insubstantial and fall into the category of surmise and conjecture. Notwithstanding the array of facts set forth by the majority, the evidence of such an "agreement" is merely colorable. The facts simply do not reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. U.S.*, 328 U.S. 781, 810, 66 S.Ct. 1125, 90 L.Ed. 2d 1575 (1946) (describing the term "conspiracy" in an antitrust context). *But,* if one is looking for *proximate*

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[1] I note that the Manual of Model Jury Instructions for the Ninth Circuit (1985 Edition) does not contain a similar instruction. Instead, at page 243 it refers textually to *Arnold* and its requirement to show proximate or legal causation. Certainly there is an appropriate role in these lawsuits for causation. But that role first requires that a conspiracy be established. *Then* the issue is whether the damages complained of were caused by that conspiracy. See Devitt, Blackmar & Wolff, § 103.22 and § 103.25.

cause, one might surely believe, when examining the inferences in this case, that a conspiracy has been spotted.

II

The Non-Smoking Words

After two years of discovery, approximately 90 depositions, answers to numerous sets of interrogatories, and extensive argument on the issue, the district court concluded that the specific facts and circumstances adduced by the Steelworkers in response to Phelps Dodge's motion for summary judgment failed to connect Phelps Dodge to a conspiracy. Not a shred of direct evidence of a conspiracy was found anywhere. It can only be concluded that the district court judge determined from the record *as a whole* that "a fair-minded jury could not return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986). Nevertheless, the majority finds a handful of very predictable words spoken by a party who viewed itself as the victim of continuing criminal conduct to have enough leverage to convert the relationship between Phelps Dodge and certain public officials into a conspiracy. I find this to be nothing more than a theory without proof.

Without passing on the constitutionality of his actions, the true import of the words "keep them off the streets" and the talk of high bail is illuminated when one reads Sheriff Clarence Dupnik's explanation of the process by which high bonds were recommended for persons arrested. The following is but a small portion of his deposition that gives his view of the challenge with which he was confronted:

> Q. Did you meet with [Department of Public Safety] officers on August 9th?

A. Yes.

Q. Did you meet with a Colonel Thompson?

A. Yes.

Q. What was discussed at that meeting?

A. We did develop a plan to deal with the problem.

Q. Was part of that plan to declare the strikers an unlawful assembly?

A. Yes.

Q. That was to be done the following day?

A. Yes.

Q. Were there any conditions under which that was to be done?

A. Yes.

Q. What were those conditions?

A. Well, I don't recall them specifically, but *we had a deputy County Attorney with us during the meeting, and it was his responsibility to see that we accomplished that objective in a legal fashion.* I don't recall the specifics of how we did it, but Major Douglas ultimately was the one who read a document to them in the manner outlined to us by the County Attorney's Office.

Q. Who was the deputy County Attorney, if you recall?

A. I don't recall.

Q. Was there any discussion at that meeting with DPS as to the resources they would have available?

A. Yes.

Q. What did they tell you?

A. I don't recall, but it was, as I recall, they provided about a hundred people.

Q. Was there any discussion at that meeting of attempts to, that could be made a diffuse the situation?

* * *

Q. Do you recall any discussions regarding the arrests for people involved on August 9th, during the days immediately around August 9th?

A. Well, that was a subject of discussion generally at most meetings, so I can't honestly say that it was on that particular date, or whether it wasn't, but I can say that on the 9th of August we decided to change our posture, because of the problem that we were confronted with, and where we had assumed a posture of extreme tolerance, trying to be as inconspicuous and as subtle as we could, we felt that if we continued in that posture that it would only aggravate the problem that now we had to change posture more towards demonstrating that we were going to enforce law and order.

Q. Did you—

A. *That that would result in the greatest possibility that we wouldn't have physical violence and injury and bloodshed.*

Q. Did you convey that change of policy to Lieutenant Garchow?

A. Well, I'm sure that I did.

Q. To others who were responsible for the Ajo area?

A. No question about it. We were confronted by rumors that the strikers had guns and they were going to shoot, and our people were very edgy, and we had a very nasty situation, and I think had we not handled, *in hindsight we can speculate however we choose, but I think basically that our, the way that we handled it resulted in no violence, basically, or bloodshed occurring essentially.*

Q. Do you know if DPS was involved in discussions with respect to the change in policy?

A. No, because they were merely acting in a support capacity to us. *We were making the decisions.*

* * *

Q. If, in fact, there were several arrests made on August 11th of strikers for strike related charges, do you know why that would, the same policy would not be pursued for those who were to be charged for August 9th?

A. Well, our policy, as I told you, changed from a reactive to a proactive posture, and as I recall, without being specific, our instructions were we're not going to tolerate illegal behavior if we can take action without being the catalyst for creating a problem. If we can arrest somebody without causing a problem, who is obviously violating the law, then we're going to do that. We need to take a posture that we're not going to tolerate violations of the law, don't care whether they are strikers or non-strikers or who. We felt that we needed to establish ourselves in the community. *We felt that we had lost control and we had to regain it.*

Q. Did that policy also apply to acts officers had witnessed on August 9th?

A. You mean retroactively?

* * *

Q. Yes. Did it apply retroactively to the things that had occurred that morning?

A. No. No.

Q. Why not?

A. Well, first of all, we weren't in the position of going out and making any kind of arrests retroactively. We were dealing with an emergency.

* * *

Q. (By Mr. McCrory) When did you first become aware of the amount of bail that was to be set on the warrants?

A. On the day that they made the arrests.

Q. Prior to that day, had anyone talked to you, any of your officers, about what recommendations should be made regarding bail?

A. I talked to them.

Q. What did you discuss with them?

A. *I told them that we should seek bonds high enough—what I was afraid—we were anticipating all the different kinds of things that might happen.* We were still very edgy about making the arrests. *What I didn't want to happen was to go out into the community and arrest a dozen people on felony charges, bring them to the Ajo station, which isn't equipped to handle a dozen felony cases, and have a log of people at the Ajo station, and have those people released within five minutes,* you know, real angry, back into the community when the tension level is still pretty high. So I thought if we could get a reasonably high bond without mentioning any amounts—*I never discussed amounts, that's up to the judge—but to make our feelings known to the prosecutor that we would like to seek a high bond for strategy reasons,* so that these people couldn't get out in five minutes back onto the streets, I asked them to do that. (Emphasis added). [ER].

The "off the street" language from Phelps Dodge to which the majority attaches so much importance loses its conspiratorial impact when read in the context of the Sheriff's explanation of his actions and when viewed in the light of his affidavit filed as Exhibit 7 in support of the motion for summary judgment. In that affidavit, Sheriff Dupnik stated:

9. All decisions with regard to the strike in Ajo that I have made in my professional capacity as Sheriff of Pima County ultimately have been my decisions reached by the exercise of my independent judgment and for the sole purpose of applying and enforcing the law in an impartial manner. No one, including PD [Phelps Dodge], the Department of Public Safety (DPS), the Pima County Attorney's Office (PCAO)

> or any justice of the peace, has attempted to impair or prevent this process.

[ER 094].

Three words end up being the difference in this case. In the view of the majority, these words—"off the streets"—uttered in connection with a request for high bail become the ultimate basis for an inference of an intent unlawfully to punish the strikers and an "*agreement* to violate or to disregard the law." The majority even adds an interpretation to these words—"*all* streets"—that with all respect is unsupported and strikes me as grasping at straws.

As to the other circumstances to which the majority points to substantiate its view that somewhere during all of this Phelps Dodge and some unidentified state actor consummated an invisible agreement amounting to a conspiracy, these too amount to little more than fodder for speculation. Yes, these circumstances existed, but where's the agreement? Where's the beef?

Each of these circumstances is admittedly capable of innocent interpretation, yet they are added up so that the whole assumes greater probative value than its aggregate parts. This appears to be rationalized with the frequently stated but mistaken belief that direct evidence of a conspiracy is "seldom available." It is correct to say that such evidence is frequently not available, but it is inaccurate to say that it is "seldom available." The problem with the "seldom available" analysis is that it begins to sound like a rule of necessity that forgives a litigant's failure to prove his case; and as I point out in Section III, this is not an appropriate setting in which to invite such a relaxed approach to the proof of critical facts.

It is with good reason that we do not permit conjecture, surmise, or speculation to determine the results in

lawsuits. Such adventures of the mind have a tendency to be unreliable. They may serve many valid purposes in everyday life, as does hearsay. But when it comes to the law and proof of an allegation, we require more, and correctly so. Conjecture in the context of proof of facts is outside the channels of careful, rational, discriminating thinking—which is the tool by which lawyers, judges and fact-finders should be guided. This is a lawsuit we are dealing with, not the interpretation of a painting. We should not be inclined to arrive at or adopt conclusions based on theory rather than demonstration. This is precisely what motions for summary judgment are designed to weed out: lawsuits based on theory without proof. Does all of this evidence add up to "state action" on the part of Phelps Dodge? I think not.

III

The Fallout

The crucial distinction between being part of a concatenation and being a member of a conspiracy is of great importance in this particular setting. We are dealing not with a group of drug peddlers, bank robbers, swindlers, or klansmen, but with a legal entity that viewed itself—rightly or wrongly—as the victim of continuing criminal conduct.

First, this setting itself makes it questionable at best to infer an agreement "to violate or to disregard the law" from anything other than reasonably clear evidence. Such an inference as to the required unlawful state of mind is usually not difficult where the object of the conspiracy is patently illegal, such as in the case of drug peddling, etc.;

but when the object of the agreement has an equally plausible lawful objective—and indeed one that is laudable—great care should be taken before imputing a conspiratorial state of mind to the parties.

Second, Phelps Dodge's approach to the proper authorities, as opposed to relying on self-help, should be encouraged. The majority makes this same point very clearly. But, by attaching special significance to one person's articulated wish at the resulting meeting with law enforcement to "keep them off the streets," and "set high bail," the majority effectively pays little more than lip service to this principle by creating a serious problem for anyone similarly situated who feels aggrieved enough to go to the police for help. There is hardly a victim in America who has not at some point uttered similar words. If the police, after hearing such words, go out and violate a protester's rights, is this sufficient without more to support a jury verdict of conspiracy between the "victim" and the police? This is precisely the kind of danger warned against by the Supreme Court in *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574 (1986) when it said:

> In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto*, 465 U.S. at 762-764, 79 L.Ed.2d 775, 104 S.Ct. 1464.
>
> [ ] Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. *See Monsanto, supra*, at 763-764, 79 L.Ed.2d 775, 104 S.Ct. 2378. '[W]e must be concerned lest a rule or precedent that authorizes a search for a particular

> type of undesirable pricing behavior end up by discouraging legitimate price competition.'

475 U.S. at 593-94.

I fear we chill the laudable goal of encouraging people to work appropriately with law enforcement in any matter involving a disturbance or continuing problem. If demonstrators take over a school, a government building, a hospital, a medical clinic, a church, a power plant or whatever, and the people responsible for the facility make what is, after this opinion, the mistake of saying "we want these people out of our building and carted off to jail with high bail," will this without more be sufficient to justify a jury verdict of conspiring to violate the protesters' rights if the police stumble and make a bad arrest or if a magistrate sets an improper amount on a bond? If a sheriff succumbs to pressure from a citizens' group against drunk driving and sets up a road block that is later ruled to be unconstitutional, are the citizens coconspirators? What will a sheriff do in a meeting with a similarly aggrieved group when one of the group utters "get 'em off the streets" language? To the extent that we are obliged to give guidance so citizens can follow the law, we may be creating quicksand where there should be a firm footing.

IV

The Standards of Review

Finally, I am troubled by the standard of review applied by the majority. It seems that in failing to grant any deference whatsoever to the trial judge, we effectively undermine the Supreme Court's holdings in *Celotex*, 477

U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), *Liberty Lobby* and particularly *Matsushita*. In *Celotex*, one reason the Supreme Court accepted the case was because of the view of a dissenting panel judge that the majority decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.* at p. 322.

In *Liberty Lobby*, the Supreme Court reprinted a similar message from *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872):

> Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. (Footnotes omitted.)

And, in *Matsushita*, the Court gives every appearance of rejecting second-guessing by an appellate court of a trial court's view of the facts.

I do not advocate abdicating our responsibility to insure a litigant is not improperly deprived of his right to a trial by jury, but a trial judge in cases such as this is in a far superior position to make judgments that deal with

the *facts*, and especially inferences. This judge lived with this case for a considerable period of time. I note that the record now fills up four large boxes and weighs 87 pounds, and this does not cover most of the depositions that by stipulation remained with the parties. Under traditional principles of standard of review jurisprudence, it would appear that the concerns of judicial administration favor the perspective of a trial judge with respect to facts and inferences. Matters of law and mixed matters of fact and law (weighing heavily on the law side) are one thing, but defects of fact in the sense that a party has no evidentiary support for an essential element of the case are another—even though constitutional rights are at stake. I am not offended by a more discerning multi-faceted standard of review that would find room for a trial court's perspective under these circumstances. It may be that the "clearly erroneous" standard would be appropriate as applied to such matters.

I think we engage in a practice that is the equivalent of what Judge Norris warned against in *U.S. v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (Norris, J., dissenting), when he said, "What the majority does is what an appellate court has no business doing: curing a defect in a . . . case by gratuitously filling in gaps in the evidentiary record." *Id.* at 1213.

I would affirm.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STEELWORKERS OF AMERICA; UNITED STEELWORKERS OF AMERICA, LOCAL 4776; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE No. 1357; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 523; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING INDUSTRY, LOCAL 741; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 428; UNITED TRANSPORTATION UNION, LOCAL 807; RONALD RHODES; WILLIAM HUNTER; WILLIAM PUFFER; DIANA PINO VEGA; SHEA BURKHEAD; AMADO GONZALEZ; ART GALVEZ; ANTONIO SANTIAGO; DAVID WILLIAMS; JOSE ORTIZ; RICHARD OLEA; JERRY WOLGAMUTH; NATALIE MUNOZ; SOILA BON; GEORGE BUSTAMANTE, individually and on behalf of others similarly situated,	
Plaintiffs-Appellants,	No. 86-2811
v.	D.C. No. CV 83-589-ACM

PHELPS DODGE CORPORATION, a New York corporation; ARIZONA DEPARTMENT OF PUBLIC SAFETY; R. L. CARSON, individually and as an Arizona Department of Public Safety Officer; HELEN GILMARTIN; PIMA COUNTY, ARIZONA, a political subdivision of Arizona; CLARENCE DUPNIK, individually and as Pima County Sheriff; J. W. BOWMAN, individually and in official capacity; R. BENSON, individually and in official capacity; C. KAYLOR, individually and in his official capacity; JOHN DOE JETT, individually and in official capacity; DAN LUDWICKZAK, individually and in his official capacity; JOHN GILMARTIN, individually and in his official capacity; RON LEE, individually and in his official capacity; DAVID ALLEN, individually and in his official capacity; GEOFFREY CHEADLE, JR., individually and in his official capacity; KATHY CASTEEL, individually and in her official capacity; RITA JETT, individually and in her official capacity; JAMES SHEETS, *Defendants-Appellees.*	OPINION

Appeal from the United States District Court
for the District Court of Arizona

Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted

August 12, 1987—San Francisco, California

Filed December 1, 1987

Before: Eugene A. Wright, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Wright; Dissent by Judge Noonan

SUMMARY

Courts and Procedure/Civil Rights

Appeal from summary judgment. Affirmed.

Appellee Phelps Dodge owns and operates a copper mine and milling plant in Ajo, Arizona. The appellant unions representing those employees went on a bitter strike dividing the town and resulting in violence by both sides. The Steelworkers sued Dodge and others and the district court granted summary judgment and costs for Dodge. The Steelworkers appealed, contending that sufficient evidence of a conspiracy was presented to require a jury trial.

[1] The Steelworkers charged Dodge with violating the strikers' civil rights under color of state law. To prevail, the union was required to prove the existence of a conspiracy. [2] To indicate a dispute of material fact in the context of a civil rights claim, there must be some evidence of control by the private party over the actions of the state officials. [3] The Steelworkers presented evidence of relationships between Dodge and the Justice of the Peace, the county attorney, and several sheriff's deputies. [4] They produced depositions of persons indicating that Dodge was not satisfied with the response of the police to the strikers and asked the police to adopt a more aggressive posture. [5] Dodge maintains, and this court agrees, that its responses to the strike were those of an innocent, aggrieved party looking for justice and for protection by the police. [6] The facts are evidence of the realities of small town life.

The dissent argues that the plaintiffs have offered evidence of a discriminatory pattern of law enforcement and lists some incidents.

COUNSEL

Jeffrey Freund, Bredhoff & Kaiser, Washington, D.C., for the plaintiffs-appellants.

James G. Speer, Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for the defendants-appellees.

OPINION

WRIGHT, Circuit Judge:

This case presents the sole question whether sufficient evidence was presented to defeat a motion for summary judgment. Following a bitter strike, the unions representing Phelps Dodge Employees in Ajo, Arizona sued the company, law enforcement officials, and others for conspiring to violate the civil rights of the strikers. The district court granted summary judgment for Phelps Dodge, and the unions appealed. We affirm.

BACKGROUND

Phelps Dodge owns and operates a copper mine and milling plant in Ajo, a few miles south of Tucson. In 1983, the unions representing those employees went on strike. By all accounts the strike was bitter, dividing the town and resulting in violence by both strikers and non-strikers. Huge demonstrations and violent confrontations met the company's attempt to replace the strikers. In this explosive situation both Pima County Sheriff's Department

Officers, and Arizona Public Safety Officers were called into Ajo.

During the strike, several strikers were arrested and charged with felonies. Bail was set at $15,000 for each. When they could not post bail they were jailed in nearby Tucson. Other strikers were arrested or cited and charged with misdemeanors.

The Steelworkers sued Phelps Dodge, Pima County, the Sheriff and individual Deputies, the Arizona Department of Public Safety and individual officers, individual attorneys of the County Attorney's Office, and the Ajo Justice of the Peace for conspiracy to deprive the strikers and their supporters of their constitutional rights in violation of 42 U.S.C. § 1983. They alleged discriminatory enforcement of the law, arrests without probable cause, and excessive bail.

The State Department of Public Safety and its officers, the Justice of the Peace, and the attorneys were dismissed. The district court then granted summary judgment and costs for Phelps Dodge. The Steelworkers appealed, contending that sufficient evidence of a conspiracy was presented to require a jury trial.

ANALYSIS

I. THE SUMMARY JUDGMENT STANDARD

This court reviews the grant of summary judgment de novo. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir. 1987). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. *Id.* at 630; *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

The question of material fact does not have to be resolved conclusively to entitle the nonmoving party to proceed to trial. However, that party must produce sufficient evidence supporting the alleged factual dispute so that a jury is required to resolve the issue. *Id.* The trial judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 2513. Considering that burden, the nonmoving party must come forward with specific facts from which a reasonable jury could find in his favor. *Id.* at 2514; *T.W. Electrical*, 809 F.2d at 631.

[1] The Steelworkers charged Phelps Dodge with violating the strikers' civil rights under color of state law. To prevail, the union was required to prove the existence of a conspiracy, as private persons act under color of state law only when they conspire with or wilfully participate with state officials to deprive others of constitutional rights. *Tower v. Gover*, 467 U.S. 914, 920 (1984); *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984).

[2] Proof of a conspiracy requires a showing of agreement or meeting of the minds between the private persons and government agents. All must, at least, share common objectives or purpose. *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). To indicate a dispute of material fact in the context of a civil rights claim, there must be some evidence of control by the private party over the actions of the state officials. *See Arnold v. International Business Machines*, 637 F.2d 1350, 1356-57 (9th Cir. 1981).

See also Mann v. City of Tucson, Dep't of Police, 782 F.2d 790, 793 (9th Cir. 1986).

[3] In response to the summary judgment motion, the Steelworkers presented evidence of relationships between Phelps Dodge and the Justice of the Peace, the county attorney, and several sheriff's deputies. They noted that many of those persons lived in or moved into company housing, that many had relatives working for Phelps Dodge, before and/or during the strike, that interest-free installment sales were made to some deputies, and that a credit account for the sheriff's department was established during the strike.

The unions contended that there was concerted activity between the company and law enforcement officers. Citing Phelps Dodge security records and Sheriff's Department logs, they alleged shared radio channels, daily meetings between deputies and security guards, and discussion of decisions regarding treatment of picketers.

[4] Finally, they produced depositions of several persons indicating that Phelps Dodge was not satisfied with the response of the police to the strikers. According to the depositions, the company consistently asked the police to adopt a more aggressive posture and to begin arresting those strikers who were most actively involved in the violent activity. There was evidence that after an especially violent and explosive confrontation at the gates had forced closure of the Ajo facilities, the company demanded that the sheriff respond forcefully. It asked that those involved be arrested, and it requested that bail be set high enough to keep the strikers off the streets.

[5] The unions assert that this is circumstantial evidence of a conspiracy between the company and the law enforcement officials requiring a trial. Phelps Dodge maintains, and we agree, that its responses to the strike were those of an innocent, aggrieved party looking for justice and for protection by the police. We hold that only speculation and conjecture could support a finding of a conspiracy.

[6] In a small town, such as Ajo, it would be unlikely that police and company employees would not be related. Because Phelps Dodge was the major landowner and employer of the area, doubtless many in every occupation lived in company-owned housing, traded at the company store, and had worked for the company in some capacity. These facts evidence the realities of small town life. They do not fulfill the unions' burden of presenting evidence of a conspiracy. A jury could only speculate that the evidence of ties between the police and the company indicated improper leverage by the company over police, attorneys, and judicial officers.

When faced with a force of strikers determined to create confrontations and to interfere with the rights of employees to report peacefully to work, the company asked for whatever relief it could obtain from law enforcement personnel. Not satisfied with what seemed ineffectual measures, and injured economically, the company urged the police to increase their level of protection. Realizing the concern of the company, the sheriff notified it in advance of actions that could cause serious repercussions. No evidence was presented from which a jury could infer that the

company and police jointly planned and implemented efforts to control the strikers.[1]

Evidence that the company insisted that the Sheriff act to stop the violence, the blockading of the company, and the breaking of the law does not indicate control over police actions necessary to indicate a dispute of material fact sufficient to meet the summary judgment motion.

In their arguments before the district court in opposition to a motion to dismiss claims against the Sheriff's Department officers, the unions made several representations and admissions. They contended that the policies of the county and the decisions of county authorities were responsible for the treatment of the strikers, the arrests, and the high bail. The evidence supports these representations. There is no evidence that would connect actions

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[1]The dissent argues that summary judgment is improper because a jury could infer the existence of a conspiracy from "contextual facts" such as the "structural relationship" between the company and the town, and the "evidence of close cooperation between the company and law enforcement officials." The dissent concedes that the record is devoid of evidence directly tying the company to the pattern of discriminatory law enforcement. It maintains, however, that "the patterns are themselves evidence of conspiracy to deny plaintiffs their civil rights."

What the dissent overlooks is the requirement that a nonmoving party, if it is to survive a motion for summary judgment, produce "specific facts" supporting its theory to go along with contextual evidence. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). In the context of a claim of conspiracy to violate the nonmoving party's civil rights, that requirement entails the production of direct evidence that Phelps Dodge exercised control of power over law enforcement officials, and that Phelps directed those officials to violate the steelworkers' civil rights. *Arnold v. International Business Machines*, 637 F.2d at 1356. In this case, no such specific facts were presented.

of the police with some further direction by Phelps Dodge. The unions have not met their evidentiary burden on the issue of conspiracy. Summary judgment was appropriate.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

The plaintiffs have offered evidence of a discriminatory pattern of law enforcement: the strikers arrested for the violent acts of August 9, 1983 charged with felonies for which high bail was set by Justice of the Peace Helen Gilmartin; striker Ronald Roades arrested without cause and a bail set by Gilmartin higher than the maximum fine imposable for the misdemeanor charged; striker Solia Bon arrested and jailed by Gilmartin for telephone harassment; striker Richard Olen [sic], as he left the picket line, arrested, handcuffed, and mistreated by police for not having his driver's license in his possession; striker Janie Ramon arrested, tried without counsel by Gilmartin, convicted of assault, and fined $500 for involvement in a fight from which neither physical nor property damage resulted. In contrast: strikebreakers slashing tires and breaking windshields on strikers' cars, and the police, when informed of the assailants' identities, doing nothing; Rick Scroggins, a strikebreaker, throwing a rock through the window of the van of Lew Patino, a striker, and then breaking Patino's jaw with a rifle butt, with Scroggins being arrested and released on his own recognizance and, having been found guilty by Gilmartin, sentenced only to make restitution for the van window; assault on Patino by Neil Groves,

a strikebreaker, reported to the police without the police taking action; telephone harassment of Nancy Flores, the wife of a striker, including the threat, "We are going to kill your kids", reported to the police who refused to investigate or install a phone "grabber" on her line; obscene actions by Arthur Love, a strikebreaker, directed at women picketers, reported to the police without the police taking action; assaults by gun by a strikebreaker on Rita Alegria and Raul Malindo, reported to the police without the police taking action.

The contrast between these two patterns is such that there is a material factual dispute over the cause of the difference. Phelps Dodge denies that it conspired with the law enforcement authorities to bring about these distinct patterns. The company asserts that the strikers who were arrested, bailed, or prosecuted were so treated pursuant to independent decisions of the police or the Justice of the Peace. The company, asserting that it was involved in no conspiracy, implies that it has nothing to explain as to the alleged failures of the police and Gilmartin in regard to violence by the strikebreakers. The company's brief fails almost completely to address these failures. In contrast, the Steelworkers urge that such disparate patterns of conduct, where the dividing line appears to be whether a man or woman is or is not a striker against Phelps Dodge, lead to a rational inference that Phelps Dodge arranged for the discriminatory patterns; that, in short, the patterns are themselves evidence of conspiracy to deny the plaintiffs their civil rights.

On this appeal from summary judgment, we cannot say who is right—Phelps Dodge protesting its innocence,

or the Steelworkers saying that the company's guilt is clear. But we must acknowledge the existence of a factual dispute, which only the triers of fact should resolve.

The court appears to believe that the only evidence the Steelworkers has offered is the evidence of the close relations that existed between the biggest employer in town and the police. The court does not address the inference of conspiracy that may be drawn from the discriminatory patterns of law enforcement. Granted that the company had every right to ask police protection of its property and the prosecution of those strikers who committed violent acts, the strikers had an equal right to protection and to the prosecution of those Phelps Dodge strikebreakers who injured them. The evidence presented by Steelworkers is that such protection and prosecution of violent acts was denied them. That evidence is undisputed. The reason for this discrimination, rational triers of fact could find, was agreement, violative of the strikers' civil rights, between Phelps Dodge and the police and Justice of the Peace Gilmartin. Inference to such an agreement would be neither guesswork nor speculation, but a rational conclusion drawn from the disparity of treatment.

When a painting is done in chiaroscuro, forms and volumes are intelligible in the contrast of light and dark. If you read only the light, the picture is a blur. The contrast conveys the meaning. A Rembrandt or a Caravaggio becomes a blank unless the pattern created by the contrast is observed. So here: a reading of only one half of the evidence prevents the pattern from being perceived.

Steelworkers' evidence does not consist solely in the small town relationships of the company and the local

officials. But these relationships are highly relevant in assessing the strength of the inference to be drawn from the discriminatory patterns. Ajo is a town whose population in 1983 was no more than 5,000. It is an isolated town, about 130 miles from Tucson. The only large employer in the town is Phelps Dodge. The only large landlord of rental property available for housing is Phelps Dodge. By virtue of these basic characteristics of the community, Phelps Dodge dominates the town.

Beyond this structural relationship of company and town, there is specific evidence of close cooperation between the company and law enforcement officials. There were many casual interactions between the police and the personnel of Phelps Dodge. There was the meeting at the plant of the Sheriff and the Plant Manager on August 9, 1985, to which the Steelworkers attach especial importance. These interactions, this meeting are not themselves evidence of conspiracy. They are evidence of the opportunity to conspire. They form a background against which the discriminatory patterns occurred and in terms of which the inferences to be drawn from these patterns may be inspected.

According to the deposition of Carlos Camarillo, the police in the town did not act "without the consent of Phelps Dodge . . . . Any time they were handing out anything they would have a sheriff's deputy close by working in coordination with them." Seven sheriff's deputies rented from Phelps Dodge. Three wives of sheriff's deputies worked for Phelps Dodge during the strike. In July of 1983, a month before the strike, Phelps Dodge Mercantile Company, the Phelps Dodge subsidiary which

operated a store in Ajo, opened a credit account for the Pima County Sheriff's Department, through which sheriff's deputies on assignment in Ajo could charge their meals. County Attorney Casteel became a tenant of Phelps Dodge during the strike.

Most remarkably, Justice of Peace Helen Gilmartin, a key player on the law enforcement scene, had been a security guard for the company. She was asked to run for her judicial office by the Chief of Security at Phelps Dodge at a time when she had been furloughed and was hopeful of being rehired by Phelps Dodge. When she was elected, she was put on leave of absence from Phelps Dodge. She had obtained company housing as a company employee and continued to rent it while no longer on the company payroll. She so identified with the company that she had personalized license plates, for which she paid an extra fee, that read, "PD Ajo", meaning "Phelps Dodge Ajo." She had had the plates for three years and did not bother to change them after assuming her judicial office. The representative of impartial justice in Ajo, she drove by the picket line with the plates and considered it "absolutely ludicrous" that anyone would make an issue of this identification with her old employer.

Helen Gilmartin's flaunting of her plates may have amounted to judicial impropriety. Who wants a judge who wears the colors of a party? But as the court observed, most of these undisputed facts do not by themselves show "improper leverage". No impropriety exists in a company renting its housing or providing credit to sheriff's deputies. No impropriety exists in a company hiring the wives of deputies. No impropriety exists in a company

security guard running for justice of the peace. These actions, all innocent in themselves, do establish in this case the closeness of the relations between the company and the police. These actions do not prove conspiracy. They are however, "contextual facts", which properly form a foundation for consideration of the factual inference in dispute. *See T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 631 (9th Cir. 1987).

Not improper leverage but leverage is what these facts establish. The landlord, the employer, the patrons had the means of applying pressure to achieve its objective. Did it do so? That remains to be seen at a trial. Steelworkers' evidence of discriminatory law enforcement raises the question whether an actual conspiracy did or did not exist. Neither a district court ruling on a motion for summary judgment nor an appellate court may properly resolve the factual issue.

The court answers this dissent in a footnote that confuses the facts showing a structural relationship with the specific facts from which conspiracy might properly be inferred. Conspiracy is normally proved by inference. It is not clear why the court is unwilling to let a jury draw inferences in this case. The ordinary rules governing summary judgment are set aside. The court decides what belongs to the jury to decide. I respectfully dissent.

APPENDIX C

Deposition of Kathy Casteel Thorson, January 23, 1985

(p. 321, l. 19 - p. 327, l. 22)

* * *

(p. 321) Q [By Mr. McCrory, Counsel for Plaintiffs] What was said at that meeting regarding imminent arrests?

Mr. Speer: Object to the form of the question.

A [By Ms. Casteel) Phelps Dodge was concerned whether any action was going to be taken against the people they believed had violated the law.

(p. 322) Q (By Mr. McCrory) What did they say?

A Just that. Are you going to take any action against these people.

Q Did they say anything more than that?

A What action are you going to take?

Q Did they say anything more than that?

A Not that I recall.

Q Was this simply one question or two questions?

A Voiced by as many people as were there it becomes more than one or two questions, but that was the basis of the questions.

Q Did Phelps Dodge personnel indicate why they thought there should be arrests?

A Yes. They had damage to their property and their, the working of their mine was being interrupted.

Q And they needed it opened?

A Yes.

Q And they thought the arrests would help keep it open?

A No.

Mr. Speer: Object to the form of the question.

Mr. Goering: Object to the foundation, too. She can't know what they were thinking.

(p. 323) A No. They were asking whether arrests were going to be made for the violations of the law as they had perceived them.

Q (By Mr. McCrory) Did the Sheriff, at that point, tell them that there would be arrests?

A Yes.

Q Do you recall whether that was before or after you had met with Detective Ludwiczak and Deputy Pettitt?

A It was before.

Q What did the Sheriff say with respect to their [sic] being arrests?

A That arrests would be made. I don't believe he specified to Phelps Dodge who or what or what charges, he just said arrests would be made.

Q Was anything said about putting people in jail?

A Phelps Dodge asked what kind of a bond was going to be put on those people.

Q And what did the Sheriff say?

A The Sheriff said that he would recommend 15,000, I believe.

Q Was there any further discussion about it?

A There was further discussion between the Sheriffs and Victor and I.

(p. 324) Q But at that meeting?

A Further discussion regarding the bail?

Q Yes.

A Phelps Dodge indicated that they felt that the circumstances of the charges and the severity of the charges that they hoped that the bail would be high.

Q Did they indicate they were satisfied with $15,000 per person?

A I don't think they indicated satisfaction or not satisfaction. He made a statement rather than one asking for their approval.

Q What did he say?

A That he would ask, make a recommendation that the bail would be 15,000.

Q Did he say why he was asking for that?

A No.

Q He just said he wanted a high bail?

Mr. Speer: Who is he in that question?

A Sheriff Dupnik. Is that Sheriff Dupnik, is that what you're referring to?

Q (By Mr. McCrory) No, I thought you had been referring to somebody from Phelps Dodge.

Mr. Speer: That's what I thought. I'll object to the form of the question.

(By Mr. McCrory) Who said they wanted a (p. 325) high bail?

A Oh—

Mr. Speer: Her testimony that someone from PD asked how much the bail was going to be, not they that they wanted a high bail?

A No. The high bail, Sheriff Dupnik said he would request $15,000, and there was, Phelps Dodge did express a desire that the bail be, that there be a significant bail, not—they didn't indicate whether they thought 15,000 was significant or not.

Q (By Mr. McCrory) They wanted it to hurt.

Mr. Speer: I'll—is that a question?

Mr. McCrory: Yes.

Mr. Speer: Hold it. Are you finished?

Mr. McCrory: Yes.

Mr. Speer: I'll object to the form of the question.

Mr. Goering: Object to the form and foundation.

A Phelps Dodge did not express that they wanted a bail that would hurt the defendants.

Q (By Mr. McCrory) And it's your testimony they didn't express any reason why they wanted a high bail, just that they did want a high bail?

Mr. Alfred: They, again, being Phelps (p. 326) Dodge?

Mr. McCrory: Phelps Dodge.

A They said they wanted those people off the streets.

Q (By Mr. McCrory) Did you understand that to mean put in jail?

A They didn't say put in jail.

Q Did you understand that to mean that they would be put in jail?

Mr. Speer: Object to the form of the question.

Mr. Alfred: The question is, what did you understand off the streets to mean, or did you have any, assign any special meaning to it?

A No. Somewhere other than obstructing the traffic into their plant, into their mine.

Q (By Mr. McCrory) A high bail would have the effect of taking them off the street and putting them in jail, wouldn't it?

Mr. Speer: Object to the form of the question.

Mr. Goering: Object to the form and foundation.

A It could have.

Q (By Mr. McCrory) Do you recall who, (p. 327) representing Phelps Dodge, made these statements?

A No.

Q Do you recall whether it was Mr. Forstrom?

A I don't believe it was Mr. Forstrom. I don't believe he said very much at all.

Q Who did most of the talking?

A I don't recall.

Q Was there any discussion of individuals who Phelps Dodge wanted to see arrested?

A Sheriff Dupnik had a list of the names of the people he intended to get warrants on, that he hoped to be able to get the warrants on. I believe he went over that list with Phelps Dodge.

Q What form was that list?

A I don't know.

Q A piece of paper; was it in his own writing, was it typed?

A I don't know. He was referring to something. I don't know. I didn't look at it.

Q The names of the people who subsequently were arrested on that list?

A I don't know. I didn't see the list.

* * *

APPENDIX D

Excerpt from Plaintiffs' Answers to Interrogatories, attached as Exhibit to Plaintiff's Exhibits in support of Plaintiffs' Statement of Facts, p. 285 of Plaintiffs' Excerpts of Clerk's Record filed with the Ninth Circuit:

> On or about the afternoon of August 23, 1983, CONRAD FLORES observed some of the lawyers for the defendant PHELPS DODGE enter the main PHELPS DODGE office building in Ajo. Approximately 20 or 30 minutes later they observed defendant HELEN GILMARTIN, J.P. drive up and enter the building. Approximately 1-1/2 hours later, GILMARTIN and the police officers were observed to leave the building. The PHELPS Dodge lawyers left the building a short time later. The arrests of many of the named individual plaintiffs and the massive show of police force described in the other interrogatories attached hereto occurred only two days after this meeting.

APPENDIX E

Deposition of Conrad Dario Florez, January 24, 1985
(p. 12, l. 15 - p. 18, l. 22 and p. 20, l. 24 - p. 22, l. 11)

* * *

(p. 12) Q [By Mr. Higgins, Counsel for Defendant Gilmartin] From the time the strike started until the incident of August 9th—do you remember the incidents of August 9th—

A [By Mr. Florez] Yes.

Q — of '83?

Between those two times did you have occasion to see Helen Gilmartin talking to any Phelps Dodge officials?

A I did not personally see her on the one-to-one basis.

Q What did you see?

(p. 13) A I observed her going to the main office, call The Hill.

Q Let me just interrupt you for a second.

Was this one occasion or more than one occasion?

A Prior to August 9th?

Q From the time the strike started until August 9th, yes.

A Two occasions.

Q Do you remember when they were?

A One was two days, three days prior to.

Q Prior to August 9th?

A Yes.

Q What did she do on that day?

A She drove past us. I was on the picket line, and she went up the driveway all the way to the main office, proceeded to get off, went inside.

Q How long was she inside the building?

A Approximately half an hour.

Q Was there anyone else in the car with her?

A Not that I could see.

Q Was—do you know what her car looks like?

A Yes.

Q Was she driving her car?

A It was her car.

(p. 14) Q Were there any other cars that appeared to be in this, following her or was she following any other cars?

A Not at that time.

Q Did you see anyone else go into the building fifteen minutes before or after the time she went into the building?

Mr. McCrory: On this one occasion?

Mr. Higgins: Yes, we're still talking August 6th, or whatever it would have been.

A No.

Q (By Mr. Higgins) Do you know who else was inside of that building during the time that she was in there, from having observed people come or go?

A No. And the answer would be no.

Q When was the—you said there was a second occasion, between the start of the strike and August 9th, when you saw her go in the main office building; is that correct?

A That is correct.

Q When was the second time?

A That was the second time.

Q Okay. When was the first time, then?

A First time was the end part of July.

Q What happened on that occasion?

(p. 15) A She drove up to the main office.

Q Was she again in her car?

A Yes.

Q Was anyone with her?

A No.

Q How long was she—did she go inside on that occasion also?

A Yes.

Q How long was she inside?

A Approximately fifteen minutes.

Q From your observations, do you know if any, who else was inside of that building during the time that she was in there on that occasion?

A No.

Q On either of those two occasions were there police, sheriffs, Department of Public Safety, any type of vehicle like that in the immediate vicinity of the main office building?

A Within a certain given period of time or—

Q During the time that she was in the main office building?

A There were some unmarked police cars.

Q How about after August 9th, did you have occasion to see Helen Gilmartin talking to any Phelps Dodge officials after August 9th?

(p. 16) A Yes.

Q When was that?

A I don't recall the exact date.

Q Can you tell me in terms of days or weeks how long it would have been after August 9th, or in relation to some other event?

A Within three days, give or take, from August 20th.

Q From August 20th?

A Yes.

Q Why do you use that date?

A During that period there was some Phelps Dodge lawyers present in Ajo.

Q The date August 20th doesn't have any particular significance for you, then, or is there some reason you picked that?

A No, I just remember August 20th.

Q Now, after August 9th, was there one time that you saw Helen Gilmartin with Phelps Dodge officials, or was it more than one time?

A One time.

Q What happened on that occasion?

A She drove up again in her car to Phelps Dodge, top of the hill. She was there approximately twenty minutes, and left.

(p. 17) Q Was there anyone with her on that occasion?

A No.

Q Did you see her talk to anyone on that occasion?

A Not from where I was standing.

Q Was she—did you even see her walking with anyone, either coming to or coming from the building?

A No.

Q Do you know who else was in the building at the time that she was in there on that occasion, from your observations?

A Not at the particular time that she was there.

Q She [sic] mentioned the fact of there being some Phelps Dodge lawyers around at some point in time?

A That is correct.

Q Does that have anything to do with this occasion several days before or after August 20th, when you saw Helen Gilmartin go to the Phelps Dodge main office building?

A It was a period of hours Phelps Dodge lawyers were at the main office, drove up to it.

Q You say Phelps Dodge lawyers. How do you know who those people are?

(p. 18) A I met them during negotiations.

Q Helen Gilmartin was or was not inside of the Phelps Dodge office building when those lawyers were inside?

A She was not there.

Q They either had been there before or were there after on the same day?

A After.

Q Now, from—have we covered all the times that you know of from July 1st until, say August 1st of 1983 that you personally saw Helen Gilmartin having any contact at all with anyone from Phelps Dodge?

Mr. McCrory: I'm going to object to the form of the question, because you originally asked about prior to the

9th, and now you're asking after the 9th. You're going back to questions prior to the 9th.

Mr. Higgins: Yeah. I'm asking if the two that you told us about prior to the 9th and the one that you told us about afterwards, are those all the times that you saw Helen Gilmartin having any contact with Phelps Dodge in any way?

A To the best of my recollection at this time.

* * *

(p. 20) Q Let me read a statement to you.

"On or about the afternoon of August 23rd, (p. 21) 1982 [sic], Conrad Florez observed some of the lawyers for the defendant Phelps Dodge, enter the main Phelps Dodge office building in Ajo. Approximately twenty or thirty minutes later they observed defendant Helen Gilmartin, JP, drive up and enter the building. Approximately one and a half hours later Gilmartin and the police officers were observed to leave the building."

Are those statements true or false?

A Neither, as a whole.

Q Let's go through them one-by-one.

"On or about the afternoon of August 23rd, 1983—" I'm not going to make you stick by a date. We'll assume that this is the day that was two or three days from August 20th that you told us about.

"Conrad Florez observed some of the lawyers for the defendant Phelps Dodge enter the main Phelps Dodge office building in Ajo." It that true?

A Yes.

Q "Approximately twenty or thirty minutes later they observed defendant Helen Gilmartin, JP drive up and enter the building."

Is that true?

A No. It was before.

Q "Approximately one and one half hours later Gilmartin and the police officers were observed to leave (p. 22) the building." Is that true?

A No.

Q What is untrue about it?

A Gilmartin left in twenty minutes, you know, after she got there, prior to the lawyers.

Q She was not accompanied by anyone when she left; is that correct?

A Not in her vehicle.

Q Did anyone else walk out the door with her to her car or halfway to her car?

A No.

* * *

Supreme Court, U.S.
FILED
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(2)

No. 88-1698

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PHELPS DODGE CORPORATION,
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v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether this Court should review the *en banc* decision of the United States Court of Appeals for the Ninth Circuit, which held that, based on the factual record before it, the District Court should have denied petitioner's motion for summary judgment.

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BRIEF FOR RESPONDENTS IN OPPOSITION

The sole issue decided by the court below was one unique to the evidentiary record in this case, *viz.*, whether respondents had proffered evidence sufficient to entitle them to get to a jury (and thus to avoid summary judgment) on their claim that petitioner had conspired with public officials to deprive respondents of their constitutional rights. By a vote of 9-2, the court of appeals concluded that the evidence proffered by respondents was sufficient, and accordingly that petitioner's motion for summary judgment should have been denied. Petitioner seeks to bring this determination respecting the strength

of the evidentiary record before this Court for review, pretending that it is founded on weighty and debatable legal constructs. The effort is a charade.[1]

1. First, contrary to petitioner's principal contention, the court of appeals approached the summary judgment question with a proper understanding of, and in complete conformity to, this Court's rulings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The majority opinion, authored by Judge Wallace, began by reciting the holding of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). (See Pet. App. A8-A10.) The court then explained that *Celotex* and *Liberty Lobby* had altered the approach to resolving summary judgment motions in conspiracy cases from that indicated in *Adickes*. (*Id.* A10-A13.) The court stated that, had this Court furnished "no further guidance" after *Adickes*,

> we would decide this appeal based on whether Phelps Dodge had foreclosed the possibility of the existence of facts from which an inference of conspiracy could be drawn. Phelps Dodge would have the burden of showing the absence of a genuine issue as to any material fact, and any unexplained gaps in the record would be held against it. [Pet. App. A10]

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[1] The Court may fairly wonder why, as the sole issue decided by the *en banc* court was one respecting the strength of an evidentiary record, the court below thought the case worthy of *en banc* consideration. The reason is that the *panel* decision, which held petitioner entitled to summary judgment, had ruled that a civil rights conspiracy must be proved by "direct evidence," and on that basis refused to accord weight to what it regarded as an entirely circumstantial submission by respondents. (Pet. App. B9 n.1). That ruling was wrong as a matter of law. But it was also wrong as a matter of fact. The *en banc* court concluded that there was "direct and highly probative evidence" of petitioner's participation in a conspiracy, in addition to the "abundant circumstantial evidence" (*Id.* A22), so that the *en banc* court did not have occasion to address the panel's legal error.

"But the Supreme Court has given additional guidance in [*Liberty Lobby* and *Celotex*]." *Id. Celotex* clarified *Adickes*, the court below explained, by holding

> that on an issue where the plaintiff has the burden of proof, the defendant may move for summary judgment by pointing to the absence of facts to support the plaintiff's claim. 477 U.S. at 322-23. The defendant is not required to produce evidence showing the absence of a genuine issue of material fact with respect to [that] issue . . . . [Pet. App. A12.]

Liberty Lobby addressed the quality of the showing required of the non-movant if it is to resist such a motion, and, as described in the opinion below, established that

> when a defendant moves for summary judgment, the trial court must determine from the record whether "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." . . . The possibility that the plaintiff may discredit the defendant's testimony at trial is not enough . . . . Mere submission of affidavits opposing summary judgment is not enough; the court must consider whether the evidence presented in the affidavits is of sufficient caliber and quantity to support a jury verdict for the nonmovant . . . . This approach to evaluating a summary judgment motion is similar to the inquiry courts make to determine the appropriateness of a directed verdict pursuant to Fed. R. Civ. P. 50(a). [Pet. App. A10-A11 (quoting and citing *Liberty Lobby*).]

From these premises, the court below identified the issue—the only issue—that it was called upon to decide at this stage of this litigation:

> We therefore must determine whether the Steelworkers presented "concrete evidence from which a reasonable jury could return a verdict in [their] favor." *Liberty Lobby*, 477 U.S. at 256. [Pet. App. A13.]

It is this issue, and only this issue, that would be before this Court were it to grant the petition for certiorari.

2. While the sufficiency of a particular evidentiary record hardly seems a matter worthy of this Court's plenary attention, the majority below was plainly correct in concluding that respondents had proffered enough evidence to require denial of the summary judgment motion. The court below cited the following in support of its conclusion:

a) It is not disputed—and was assumed *arguendo* by petitioner in the courts below—that a number of public officials had violated respondents' civil rights in the course of a lawful strike by respondents against petitioner. A jury, after trial against the county, the county sheriff, and several of the sheriff's deputies, answered interrogatories finding that some respondents had been arrested without probable cause, that all had been subjected to excessive bail conditions, and that the sheriff and several deputies had discriminated against respondents and in favor of strikebreakers in carrying out their law enforcement duties. The damage verdicts exceeded $200,000.[2] It also was clear that the actions of the Justice of the Peace and the County Prosecutor were integral to the infliction of these constitutional violations, albeit they had secured their dismissal from the lawsuit on the basis of absolute immunity.[3] These public

[2] The jury verdict and interrogatory answers came while the instant appeal was pending before the panel in the Ninth Circuit, and were attached as an Appendix to the Reply Brief of Appellants United Steelworkers of America, *et al.* At the time that the district court had the summary judgment motion before it, the jury trial had not yet occurred, but even at that stage petitioner assumed *arguendo* that the public officials had committed the civil rights violations alleged.

[3] As the court below recounted, the Justice of the Peace issued arrest warrants without requiring any showing of probable cause, and followed unorthodox procedures—contrary to her usual practice

officials met with each other and planned and agreed upon the course of conduct found unconstitutional by the jury. (*Id.* A15, A16.) It is this body of evidence to which the court below referred in declaring that there was a "smoking gun" and asking whether petitioner "helped pull the trigger." (*Id.* A21.)

b) There was abundant evidence that petitioner had powerful ties to, and leverage over, nearly all of the public officials whose actions contributed to the constitutional violations. Petitioner owned virtually the entire community, a classic "company town." (*Id.* A14.) The Justice of the Peace, who issued the arrest warrants without probable cause and set the excessive bail (see n.3, *supra*), was a security guard employed by petitioner; she was on leave to serve in the judicial position for which petitioner had nominated her; her close relatives worked for petitioner; she lived in housing rented from petitioner; and her automobile license plate ("PD AJO") proclaimed her attachment to petitioner (*id.* A14). Several of the sheriff's deputies were former employees of petitioner; several currently had spouses and relatives working for petitioner, some as strikebreakers; many lived in housing rented from petitioner. (*Id.* A15.)

c) There was abundant evidence—including evidence of specific meetings between petitioner and the public officials—to show that petitioner had pressured these public officials to arrest respondents and set bail so high that they would be kept "off the streets" (*id.* A15-A17, A21-A22), and that the public officials reluctantly acquiesced in petitioner's demands although their official judgments were that the course was neither warranted nor wise. Indeed, the public officials had publicly de-

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—in setting $15,000 bail for each arrestee without inquiry into their individual circumstances or the strength of the case against each. (Pet. App. A16-A17, A22-A23.) The County Attorney sought the arrest warrants, and high bail, without proffering the usual justifications. (*Id.*)

clared that they thought the community's interests would be better served if there were *not* arrests of strikers. (*Id.* A16.)

d) The record was replete with evidence that petitioner was in virtually constant communication with the law enforcement officials, and that over an extended period of time those officials unconstitutionally discriminated against strikers and in favor of strikebreakers in enforcing the law. (*Id.* A17-A18.) That discrimination served petitioner's interest in operating its facility with strikebreakers, but served no apparent public interest.

The record evidence supporting respondents' contention that petitioner participated in a conspiracy to violate their constitutional rights is in truth far more detailed than the recitation in the opinion of the court of appeals. A full accounting appears in respondents' briefs to that court.[4] Were this Court to grant the petition for certiorari, we would of course rely on the entirety of that evidence to support the judgment below. The central point, however, is that this Court's plenary jurisdiction has better uses than to study the three volumes of evidence introduced by respondents in opposition to petitioner's summary judgment motion in order to second-guess the assessment of nine Court of Appeals' judges that a triable evidentiary case resides therein.

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[4] See Brief of Appellants United Steelworkers of America, *et al.*, 4-18, 22-24; Reply Brief of Appellants United Steelworkers of America, *et al.*, 2-13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES

42 U.S.C. § 1983 ..... 2, 4, 7

Phelps Dodge has sought review of a Ninth Circuit opinion which holds in effect that the purported evidence of a civil rights "conspiracy" in this case was not only sufficient to avoid summary judgment, but would also be sufficient (as it must be under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)) to support a plaintiffs' verdict at trial. It should be cause for concern to this Court that while a majority of the *en banc* panel may have been satisfied with the "inference" of conspiracy to be drawn from this evidence, five other judges (including the trial judge, the majority of the three-judge panel and the two *en banc* dissenters) viewing the same evidence, found that it could give rise to an inference of conspiracy only by what the decision of the three-judge panel called "speculation and conjecture." (App. B-8). The defect in the *en banc* opinion which is underscored by this divergence of views is that the opinion is devoid of any standard by which to distinguish a legally justifiable inference from mere suspicion and speculation.

Plaintiffs' response to the Petition for Certiorari suggests that this Court need not and should not concern itself with this case because it is fact intensive, involving as it does issues of the sufficiency of plaintiffs' evidence to merit a trial. If this were the proper test for this Court's review, the Court would never have addressed the serious issues raised by *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970), *Anderson, supra, Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), or *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), each of which also dealt with purely legal issues of evidentiary standards on motions for summary judgment. These are issues of widespread and immediate

concern to every District Court in the country, particularly those which will be cited to the Ninth Circuit's opinion here – an opinion which constitutes seriously flawed precedent contradictory to this Court's prior decisions.

The Brief in Opposition begs the question by citing the Ninth Circuit's opinion as its own support, by mischaracterizing legal issues as factual questions, and by trying to downplay the importance of the evidentiary burden for avoiding summary judgment. In the process, plaintiffs have little to say about the arguments actually raised in the Petition for Certiorari. It is no answer for plaintiffs to contend that the Ninth Circuit cited and quoted this Court's prior decisions; the question is whether the Ninth Circuit followed them, and it did not.

Plaintiffs have not even addressed the errors of the Ninth Circuit in substituting a naked "assumption" of a conspiracy for a void in the evidence, its extraction of crucial affirmative "inferences" from at best neutral evidence, and its failure to require any evidence of the necessary element that a private party must have directed, controlled or participated in the purported civil rights violation before it may be liable under 42 U.S.C. § 1983. Plaintiffs also fail to address the chilling effect of the Ninth Circuit's opinion upon the right of a private citizen to enlist the aid of law enforcement authorities in the face of violence.

In addition to avoiding the legal issues, plaintiffs' response also abuses the evidentiary record. At pages 4 and 5, plaintiffs refer to a trial between the parties remaining in the case after Phelps Dodge was granted

summary judgment and argue that "it is this body of evidence to which the court below referred in declaring that there was a 'smoking gun' and asking whether petitioner 'helped pull the trigger.'" It would have been clearly erroneous for the Ninth Circuit to have based its decision in any part on the outcome of a trial to which Phelps Dodge was not a party and which took place after Phelps Dodge was granted summary judgment. Plaintiffs' suggestion that that trial provided the "smoking gun" referred to in the Ninth Circuit's opinion is nothing more than plaintiffs' attempt to rescue that court from its own egregious error of *assuming* a conspiracy as the predicate for its analysis. (It should be noted that the verdict so heavily relied upon by plaintiffs was not only outside the record but also made no finding of any conspiracy involving any defendant, much less Phelps Dodge.)

If, as plaintiffs suggest, the Ninth Circuit was of the impression that some conspiracy between others than Phelps Dodge (such as the Justice of the Peace and County Attorney's office) had been admitted for purposes of the motion and appeal, it was under a serious and perplexing misconception. As the Petition makes clear, the entire thrust of the underlying motion for summary judgment was the absence of *any* evidence to support plaintiffs' conspiracy allegations.

The Ninth Circuit did not, contrary to plaintiffs' Brief, "refer" to anything in support of its conspiracy finding. It merely "assumed" the existence of a conspiracy and, in doing so, departed from the requirements of *Celotex*, *Anderson* and *Matsushita*. While those cases stand for the proposition that mere claims without evidence will not suffice to get a case past summary judgment, the

case at bar stands for the incongruous notion that mere assumptions without evidence will.

Plaintiffs' Brief seriously distorts the evidence in other particulars as well, and without citations to the record. For example, the Brief suggests (p. 5) that the officials with whom Phelps Dodge is alleged to have conspired (the Sheriff, the Justice of the Peace, or others) "reluctantly" took the actions about which plaintiffs complain, and only at Phelps Dodge's insistence. As has been their pattern throughout this case, plaintiffs merely recite their own conclusions and inferences. They fail to refer to any evidentiary facts to merit these conclusions, nor were there any.

It would not be productive at this point to detail each of these factual distortions. The record will demonstrate what constituted evidence as distinguished from plaintiffs' (and the Ninth Circuit's) interpretation of the evidence.

This appeal is on an uncontradicted set of facts consisting almost exclusively of plaintiffs' own evidence. Phelps Dodge did not contradict plaintiffs' evidence for purposes of summary judgment, but rather challenged its sufficiency under the substantive law governing 42 U.S.C. § 1983. Phelps Dodge has asked this Court to review the matter in order to articulate the proper legal standard against which the evidence must be measured in assessing whether a plaintiff has met its evidentiary burden in proving a conspiracy by "inference."

It is not sufficient that the evidence merely gives rise to suspicion or that an inference can somehow be rationalized from the facts:

> "in drawing inferences . . . the court can draw only such inferences as a jury might have *fairly* drawn from the evidence. The court is not bound to draw inferences that are strained, forced, or contrary to reason." *Farmer's Ad. v. Ches. & Ohio Ry. Co.*, 144 Va. 65, 92, 131 S.E. 334, 342 (1926)(emphasis in original)(citations omitted); *accord* Williams v. Chesapeake Bay Bridge, 208 Va. 714, 717, 160 S.E. 2d 573, 575-76 (1968).

CUNA Mutual Insurance Society v. Navy Yard Credit Union, Inc., Nos. 860983, 861208, slip op. (Va., April 21, 1989).

It is respectfully submitted that the appropriate legal test for the permissibility of an inference of a civil rights conspiracy from circumstantial evidence is as has already been established by this Court with respect to antitrust conspiracy: in order to avoid summary judgment, plaintiff should be required to produce specific evidence which "tends to exclude" the possibility of non-conspiratorial conduct. *Matsushita, supra*, 475 U.S. at 588, quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). As applied to the instant case, if the inference that the challenged law enforcement action was the consequence of independent law enforcement decisions is "at least equal to the inference that it was due to conspiracy," then judgment was proper for Phelps Dodge. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968). The Ninth Circuit applied no such threshold standard. Instead, it held in effect that it would turn the entire matter over to a jury no matter how attenuated the "inferences" involved might be.

The Ninth Circuit's opinion violated this Court's standards for summary judgment for the additional reason that it relied upon unspecified "other" evidence which might be produced by plaintiffs at trial. The opinion concluded that "the disputed fact [the purported conspiracy] will be proven, if it can be, by other direct and circumstantial evidence." (A-24). Plaintiffs' Brief fails to address this problem. It was plaintiffs' responsibility to produce evidence in response to the motion (not at a later date) which could satisfy their evidentiary burden and support a plaintiffs' verdict. If they failed to specify such evidence, summary judgment was required. *Anderson*, 477 U.S. at 249-250. The Ninth Circuit's reversal on the theory that plaintiffs' case will be proven at trial, "if it can be," through "other" evidence not produced or identified in response to the motion, is directly at odds with that requirement.

Plaintiffs contend (at page 6) that in order to review the Ninth Circuit's opinion on certiorari, this Court would be required to "study the three volumes of evidence introduced by [plaintiffs] . . . in order to second guess . . . that a triable evidentiary case resides therein." Plaintiffs fail to recognize that it was their own burden to point to specific evidentiary facts in the record in opposition to Phelps Dodge's motion; it was not and is not the responsibility of this or any other Court to sift through an undifferentiated mass of "evidence" to preclude the existence of some fact which might bar summary judgment. Plaintiffs submitted reams of paper to the trial court, but

they never met their burden to set forth "specific facts" showing a genuine issue for trial. F.R.C.P. 56(e). If there was "other," better evidence, plaintiffs have never identified it.

Plaintiffs likewise fail even to address the substantive legal issue of whether a private defendant may be held liable under 42 U.S.C. § 1983 in the absence of any evidence that it directed, controlled or participated in the alleged civil rights violations by law enforcement authorities. This was another independent element of plaintiffs' claims for which there was insufficient evidence, and on that basis as well summary judgment was required.

This case is no more a simple dispute of fact than were *Adickes, Celotex, Anderson* or *Matsushita.* It involves far-reaching legal issues of conspiracy, summary judgment procedure and the law of evidence regarding inferences from circumstantial facts. The Ninth Circuit's *en banc* decision establishes several erroneous legal principles involving not only these issues but also serious public policy concerns regarding the public's exposure to charges of a civil rights "conspiracy" merely for asking law enforcement authorities for protection. For these reasons, Phelps Dodge petitions this Court to issue its Writ of Certiorari to the United States Court of Appeals

for the Ninth Circuit to review and reverse the decision below.

Respectfully submitted,

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